The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, Plaintiff, v. THE UNITED STATES DEPARTMENT OF JUSTICE, and LORETTA LYNCH, in her official capacity as Attorney General of the United States, Defendants.	No. 2:16-cv-00538-JLR DECLARATION OF AMBIKA K. DORAN IN OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS [DKT. 38] ***Noted on Motion Calendar***: September 23, 2016 **ORAL ARGUMENT REQUESTED**

1. ***Identity of Declarant.*** I am a partner with the law firm Davis Wright Tremaine LLP, counsel for Plaintiff Microsoft Corporation. I make this declaration from personal knowledge and a review of the files and records in this matter.

2. ***Copies of Unpublished Decisions***. Microsoft's Opposition to the Government's Motion to Dismiss cites five unpublished cases that counsel for Microsoft could not locate in electronic research databases. This declaration attaches copies of these decisions, as follows:

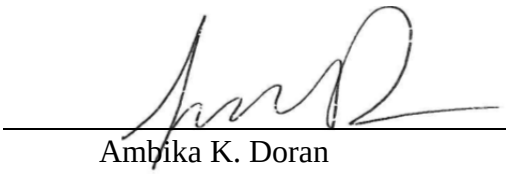
- ***United States v. Gigliotti,*** No. 15-204, slip op. (E.D.N.Y. Dec. 23, 2015), ECF No. 114. I attach as **Exhibit A** a true and correct copy of this opinion, which my office downloaded from the Public Access to Court Electronic Records ("PACER") database for the United States District Court for the Eastern District of New York.

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

- ***In re Nat'l Sec. Letters***, No. 11-cv-2173, slip op. (N.D. Cal. March 29, 2016). I attach as **Exhibit B** a true and correct copy of this opinion, which my office downloaded from the website https://www.eff.org/document/redacted-order.
- ***In re Nat'l Sec. Letters***, No. 16-518, slip op. (D.D.C. July 25, 2016). I attach as **Exhibit C** a true and correct copy of this opinion, which my office downloaded from the website http://www.dcd.uscourts.gov/sites/dcd/files/16-518Opinion_Redacted.pdf.
- ***Lynch v. [Under Seal]***, No. 15-1180, slip op.(D. Md. Sept. 17, 2015), ECF No. 26-10. I attach as **Exhibit D** a true and correct copy of this opinion, which my office downloaded from the PACER database for the United States District Court for the District of Maryland.
- ***In re Fifteen Subpoenas***, No. 16-MC-1300, slip op. (E.D.N.Y May 12, 2016), ECF No. 2. I attach as **Exhibit E** a true and correct copy of this opinion, which my office downloaded from the PACER database for the United States District Court for the Eastern District of New York.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Signed this 26th day of August, 2016, at Mercer Island, Washington.



Ambika K. Doran

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. I further hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participant:

Stephen P. Wallace
1116 Sheffer Road – Apt. F
Aurora, IL 60505

DATED this 26th day of August, 2016.

Davis Wright Tremaine LLP
Attorneys for Microsoft Corporation

By *s/ Stephen M. Rummage*
Stephen M. Rummage, WSBA #11168
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
Telephone: (206) 622-3150
Fax: (206) 757-7700
E-mail: steverummage@dwt.com

Davis Wright Tremaine LLP
LAW OFFICES
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
206.622.3150 main · 206.757.7700 fax

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- x
UNITED STATES OF AMERICA,

- against -

ANGELO GIGLIOTTI, ELEONORA GIGLIOTTI, GREGROIO GIGLIOTTI, and FRANCO FAZIO,

Defendants.
---------- x

MEMORANDUM & ORDER

15 CR 204 (RJD)

DEARIE, District Judge

Defendants Gregorio Gigliotti, his wife Eleonora Gigliotti, and their adult son Angelo Gigliotti are charged with, *inter alia*, conspiracy to import and importation of cocaine, in violation of 21 U.S.C. §§ 952(a), 960(a)(1), 960(b)(1)(B)(ii), and 963. Indictment, ECF No. 45; Superseding Indictment, ECF No. 51. The cocaine was allegedly stashed inside shipments of produce sent from Costa Rica to an import-export company owned by Gregorio. See Mem. Law Supp. Pretrial Mots. 3, ECF No. 76 [hereinafter Defs.' Mem.].

Defendants submit joint pretrial motions, seeking, *inter alia*, an order from the Court excluding evidence obtained by the government pursuant to grand jury subpoenas that instructed recipients not to disclose the existence of the subpoenas. For the reasons discussed below, the Court denies defendants' motion to exclude such evidence.

BACKGROUND

Defendants Gregorio, Eleonora, and Angelo were indicted on April 22, 2015, on one count of conspiracy to import cocaine. ECF No. 45. A superseding indictment filed on May 6, 2015, added five more counts, including importation of cocaine, and added Gregorio's cousin, Franco Fazio, as a fourth defendant. ECF No. 51.

On August 19, 2015, Gregorio, Eleonora, and Angelo filed joint pretrial motions, seeking, *inter alia*, an order from the Court "excluding all evidence obtained by the government through and on account of the blatantly improper use of grand-jury subpoenas." Defs.' Mem. 2. Defendants directed the Court's attention to a grand jury subpoena dated May 11, 2015, which was issued, in connection with this case, to accountants for Angelo. Id. at 25. The subpoena contains the following language (the "Non-Disclosure Language"):

> YOU ARE HEREBY DIRECTED NOT TO DISCLOSE THE EXISTENCE OF THIS SUBPOENA, AS IT MAY IMPEDE AN ONGOING INVESTIGATION.

Id. at Ex. 8.

On October 7, 2015, this Court directed the government to provide additional information regarding its use of grand jury subpoenas in this case and others. Specifically, this Court ordered the following:

> Given the defenses' persistent and understandable objections to language added to grand jury subpoenas, the Court orders the government to file a report detailing: (1) how extensively this or similar language has been used in grand jury subpoenas by the United States Attorney's Office, (2) what training or procedures the Office has initiated to review grand jury subpoenas, and (3) what steps the Office has taken to ensure that similar language is not used in the future, absent specific judicial authorization.

In response, the government submitted a partially-redacted letter dated November 6, 2015. ECF No. 107. First and foremost, the government acknowledged (as it had before[1]) that its use of the Non-Disclosure Language was improper. ECF No. 107. The government asserted that it is not the practice and policy of the United States Attorney's Office for the Eastern District

[1] The government also acknowledged in its opposition brief that the use of the Non-Disclosure Language was improper. See Government's Mem. Law Opp'n Defs.' Pretrial Mots. 29, ECF No. 95.

of New York (the "Office") to include such language in grand jury subpoenas to witnesses. Id. at 2. Rather, "Office and Departmental training instructs that non-disclosure may not be imposed on a grand jury witness absent statutory authority or judicial order." Id. at 4. The government stated that absent such legal authority, the Office's policy has been to include a request, not a command, for non-disclosure. Id. at 3.

Nevertheless, the government informed the Court that three of the thirty-eight grand jury subpoenas issued in connection with this case included the Non-Disclosure Language "in violation of [the Office's] practice and policy." Id. at 3-4. The government offered the curious representation to the Court that "[t]he inclusion of such language was inadvertent and unintentional," having been "missed by undersigned counsel when the subpoenas were finalized by support staff." Id. at 3.

The government stated that "in light of the error revealed by the present motion, the government has issued letters to the three recipients of the grand jury subpoenas in question notifying them of the error and advising them that they are under no legal obligation not to disclose their receipt or responses to the subpoenas." Id. at 3. The government also stated that following this Court's order dated October 7, 2015, the Office directed all Assistant United States Attorneys ("AUSAs") not to include requests for non-disclosure on the face of subpoenas. Id. Instead, such requests will now be made in a separate cover letter "[t]o avoid any appearance that such language carries with it judicial authority." Id.

DISCUSSION

The government's improper directions to subpoena recipients are cause for serious concern. As the government acknowledges, Fed. R. Crim. P. 6(e)(2) imposes no obligation of secrecy on grand jury witnesses. See Fed. R. Crim. P. 6(e)(2)(A) ("No obligation of secrecy may

be imposed on any person except in accordance with Rule 6(e)(2)(B)."); Fed. R. Crim. P. 6(e)(2)(B) (not including witnesses among the list of persons bound by an obligation of secrecy). As the United States Supreme Court summarized in United States v. Sells Engineering, Inc., 463 U.S. 418 (1983),

> Rule 6(e) of the Federal Rules of Criminal Procedure codifies the traditional rule of grand jury secrecy. Paragraph 6(e)(2) provides that grand jurors, government attorneys and their assistants, and other personnel attached to the grand jury are forbidden to disclose matters occurring before the grand jury. Witnesses are not under the prohibition unless they also happen to fit into one of the enumerated classes.

Id. at 425. As these authorities make clear, it was improper for the government to include the Non-Disclosure Language in grand jury subpoenas issued to witnesses.

The question here, however, is whether the relief sought by defendants—the suppression of evidence—is an authorized and appropriate remedy. The Court finds that it is not.

Defendants rely primarily on two cases in arguing for suppression: United States v. Bryant, 655 F.3d 232 (3d Cir. 2011); and In re Grand Jury Proceedings (Diamante), 814 F.2d 61 (1st Cir. 1987). Neither case, however, nor any other authority identified by defendants or the Court, supports the use of such an extraordinary remedy.[2] Rather, the cases support the government's position that the remedy already undertaken—sending corrective letters to the recipients of the subpoenas in question—is sufficient.

In Diamante, a grand jury subpoena issued to a witness was accompanied by a letter, from one of the prosecutors in the case, stating the following:

> You are not to disclose the existence of this subpoena or the fact of your compliance for a period of 90 days from the date of the

[2] Fed. R. Crim. P. 6(e)(7) provides that a "knowing violation of Rule 6 . . . may be punished as a contempt of court," a remedy defendants do not seek here, but the Rule is silent as to suppression.

> subpoena. Any such disclosure could seriously impede the investigation being conducted and, thereby, interfere with the enforcement of the federal criminal law.

Diamante, 814 F.2d at 63-64. Despite finding that the government's practice of sending such letters violated Fed. R. Crim. P. 6(e)(2) and "impose[d] an impermissible burden on its recipients," the First Circuit ordered, as a remedy, only that the government contact the recipients of the letters and inform them that they were under no obligation of secrecy. Id. at 70.

Similarly, in Bryant, the government issued grand jury subpoenas to potential witnesses with the following language placed on the front of each subpoena:

> Disclosure of the nature and existence of this subpoena could obstruct and impede a criminal investigation into alleged violations of federal law. Therefore, the United States Attorney requests that you do not disclose the existence of this subpoena.

Bryant, 655 F.3d at 237-38. The Third Circuit found that the district court's remedy—ordering the government to send corrective letters to the subpoena recipients five months before trial—was sufficient, "[e]ven if there were witnesses . . . with the mistaken impression that they could not speak to the defense." Id. at 239.

The District of Connecticut addressed a similar situation, and reached a similar result, in United States v. Blumberg, No. 3:97-CR-119 (EBB), 1998 WL 136174 (D. Conn. Mar. 11, 1998). There, grand jury witnesses received letters from the United States Attorney's Office requesting that the witnesses not "disclose either the existence or contents of the subpoena, as such disclosure may impede a grand jury investigation, and, thereby, interfere with the enforcement of federal law." Id., at *1 (internal quotation marks omitted). In denying the defendants' motion to exclude the testimony of all persons who received this letter, the court reasoned as follows:

> [T]he relief sought is not supported by law. . . . The defendants ask the Court to take the extreme position that the testimony of all

> persons who received this letter from the U.S. Attorneys' Office be excluded, but fail to cite any support for such an order. . . . Since the defendant can cite no authority which requires that the government do more than it has already offered [*i.e.*, contact the witnesses and explain the error], even if the Court were to find a violation of Fed. R. Crim. P. 6(e)(2), the Court denies the defendant[s'] Motion to Exclude Testimony of Witnesses.

Id., at *1-2. The court relied, in part, on Diamante. See id., at *1.

Defendants argue that the government's misconduct here is more "egregious" than in Diamante, Bryant, and Blumberg—principally because here the government commanded, rather than requested, non-disclosure—and, as a result, a more severe remedy is warranted here than in the cited cases. See Defs.' Mem. 27; Reply Mem. Law Supp. Pretrial Mots. 7, ECF No. 99. The Court is not convinced. First, Diamante also involved a command, rather than a request, for non-disclosure. Although the language was included in a letter, rather than on the face of the subpoena, it conveyed the same message as the Non-Disclosure Language challenged here. As the court there stated, it "fail[ed] to see how a reasonable, law-abiding person who received such a letter would think anything other than that he was being told that he was legally obligated not to [disclose the existence of the subpoena or the fact of his compliance with it]." Diamante, 814 F.2d at 70. Second, while Bryant and Blumberg did involve requests, rather than commands, for non-disclosure, those courts found that contacting the witnesses and explaining the error was a sufficient remedy *even if* the requests were mistaken for commands or violated Fed. R. Crim. P. 6(e)(2). See Bryant, 655 F.3d at 239; Blumberg, 1998 WL 136174, at *2.

This Court finds the reasoning in Blumberg persuasive. Defendants have not identified, nor has the Court, any precedent for granting suppression under these facts, and the Court finds that suppression here is not supported by law and is not warranted.

The Court also emphasizes that the only feature of the subpoenas in question that defendants challenge is the Non-Disclosure Language.[3] Defendants do not allege that the grand jury inquiry itself is improper, or that the information requests contained in the subpoenas are unlawful. Thus, the evidence that defendants seek to suppress is not the product of the government's misconduct, and defendants' argument that "all evidence obtained as a result of [the government's misconduct] should be suppressed" is unavailing. Defs.' Mem. 25.

Accordingly, defendants' motion is denied.

A word of caution, however, to the government. This ruling is not meant to suggest that suppression, as drastic a remedy as it may be, or other significant sanctions, might not be available to a court should practices of this sort persist. Indeed, now that the government is unambiguously on notice of this problem and the need to correct it, continued violations could well warrant severe remedies.

This admonition is triggered, in part, by the government's disappointing response to the Court's October 7, 2015, request for a delineation of the scope of this problem and the Office's plan to address it. The Court takes little comfort in the fact that the Office's official policy conforms to Rule 6(e); such policy was violated multiple times here, and it is apparent that such violations are not isolated to this case.[4] And the Court is, frankly, bemused by the government's rather glib explanation that the violations were simply "inadvertent and unintentional."

The Court's bigger concern, however, is that the Office has not yet taken adequate steps to prevent violations of this sort from happening again. The Office's direction to all AUSAs that

---

[3] Indeed, during an in camera examination of the three subpoenas, the Court saw no indication that they are otherwise vulnerable to attack.

[4] Defense counsel represented to the Court during oral argument on October 8, 2015, that a similar incident occurred in one of his cases in 2006. See Tr. Criminal Cause Oral Arg. 32-34, Oct. 8, 2015.

grand jury subpoenas no longer include, on their face, non-disclosure requests is a step in the right direction. But the government has yet to explain, in specific terms, how it will ensure compliance with its policy moving forward, and it has yet to reassure the Court that it has adequately conveyed the seriousness of this issue to all of its AUSAs. The government proceeds at its peril.

CONCLUSION

For the reasons discussed above, the Court denies defendants' motion to exclude evidence obtained pursuant to grand jury subpoenas that included improper non-disclosure commands. While the government's improper directions to subpoena recipients are cause for serious concern, suppression of the evidence in question is not supported by law and is not warranted.

SO ORDERED.

Dated: Brooklyn, New York
December 23, 2015

/s/ Judge Raymond J. Dearie

RAYMOND J. DEARIE
United States District Judge

Exhibit B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: NATIONAL SECURITY LETTERS,

Case No. 11-cv-02173-SI ; Case No. 3:11-cv-2667 SI; Case No. 3:13-mc-80089 SI; Case No. 3:13-cv-1165 SI
SEALED

ORDER RE: RENEWED PETITIONS TO SET ASIDE NATIONAL SECURITY LETTERS AND MOTIONS FOR PRELIMINARY INJUNCTION AND CROSS-PETITIONS FOR ENFORCEMENT OF NATIONAL SECURITY LETTERS

These related cases involve two electronic communication service providers who received National Security Letters ("NSLs"), a type of administrative subpoena, issued by the Federal Bureau of Investigation. The NSLs sought subscriber information, and were issued by an FBI Special Agent in Charge who certified that the information sought was relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. *See* 18 U.S.C. § 2709(b) (2014). The NSLs also informed the providers that they were prohibited from disclosing the contents of the subpoenas or the fact that they had received the subpoenas, based upon a certification from the FBI that such disclosure may result in "a danger to the national security of the United States; interference with a criminal, counterterrorism, or counterintelligence investigation; interference with diplomatic relations; or danger to the life or physical safety of any person." 18 U.S.C. § 2709(c)(1) (2014).

In 2011 and 2013, the electronic communication service providers filed these lawsuits seeking to set aside the NSLs as unconstitutional. In 2013, this Court reviewed the 2013 versions

of the NSL statutes and held that the nondisclosure requirements and related provisions regarding judicial review of those requirements suffered from significant constitutional infirmities that could not be cured absent legislative action. While these cases were on appeal to the Ninth Circuit Court of Appeals, Congress amended the NSL statutes through the passage of the USA Freedom Act of 2015 ("USAFA"), Pub. L. No. 114-23, 129 Stat. 268 (2015). The Ninth Circuit remanded these cases to this Court to reexamine the providers' challenges to the NSL statutes in light of the amendments.

Now before the Court are petitioners' motions for a preliminary injunction and renewed petitions to set aside the NSLs, and the government's cross-petitions to enforce the NSLs. The Court held a hearing on these matters on December 18, 2015. After careful consideration of the parties' papers and arguments, the Court concludes that the 2015 amendments to the NSL statutes cure the deficiencies previously identified by this Court, and that as amended, the NSL statutes satisfy constitutional requirements. This Court has also considered the appropriateness of continued nondisclosure of the four specific NSL applications which gave rise to these cases. As to three of the certifications (two in case 3:13-cv-1165 SI and one in case 3:11-cv-2173 SI), the Court finds that the declarant has shown that that there is a reasonable likelihood that disclosure of the information subject to the nondisclosure requirement would result in a danger to the national security of the United States, interference with a criminal, counterterrorism or counterintelligence investigation, interference with diplomatic relations or danger to a person's life or physical safety. As to the fourth (in case 3:13-mc-80089 SI), the Court finds that the declarant has not made such a showing.

BACKGROUND

I. 2013 Decisions of this Court and Prior Cases Testing Constitutionality of the NSL Provisions

On [redacted] 2011, pursuant to the National Security Letter Statute, 18 U.S.C. § 2709, the FBI issued an NSL to petitioner A, an electronic communication service provider ("ECSP"),

seeking "all subscriber information, limited to name, address, and length of service, for all services provided to or accounts held by the named subscriber and/or subscriber of the named account." Dkt. No. 7, Ex. A in 3:11-cv-2173 SI. By certifying, under section 2709(c)(1), that disclosure of the existence of the NSL may result in "(i) a danger to the national security of the United States; (ii) interference with a criminal, counterterrorism, or counterintelligence investigation; (iii) interference with diplomatic relations; or (iv) danger to the life or physical safety of any person," the FBI was able to prohibit petitioner from disclosing the existence of the NSL. 18 U.S.C. § 3511(b)(2-(3) (2014). On May 2, 2011, petitioner filed a Petition to Set Aside the National Security Letter and Nondisclosure Requirement, pursuant to 18 U.S.C. § 3511(a) and (b). *In re National Security Letter*, 3:11-cv-2173 SI. The government opposed the petition, filed a separate lawsuit seeking a declaration that petitioner was required to comply with the NSL, *United States Department of Justice v. Under Seal*, 3:11-cv-2667 SI, and filed a motion to compel compliance with the NSL.

Petitioner challenged the constitutionality – both facially and as applied – of the nondisclosure provision of 18 U.S.C. § 2709(c) and the judicial review provisions of 18 U.S.C. § 3511(b) (collectively "NSL nondisclosure provisions").[1] Petitioner argued that the

[1] The version of the NSL statutes in effect at the time these lawsuits were filed in 2011 provided as follows. 18 U.S.C. §§ 2709(a) and (b) stated that a wire or electronic communication service provider was required to comply with a request for specified categories of subscriber information if the Director of the FBI or his designee certified that the records sought were relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person was not conducted solely on the basis of activities protected by the First Amendment to the Constitution of the United States. 18 U.S.C. §§ 2709(a)-(b) (2011). Section 2709(c)(1) provided that if the Director of the FBI or his designee certified that "there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person," the recipient of the NSL was prohibited from disclosing to anyone (other than to an attorney to obtain legal advice or legal assistance with respect to the request) that the FBI sought or obtained access to information or records sought in the NSL. 18 U.S.C. § 2709(c)(1) (2011). Section (c)(2) required the FBI to inform the recipient of the NSL of the nondisclosure requirement. 18 U.S.C. § 2709(c)(2) (2011).

Section 3511 governed judicial review of NSLs and nondisclosure orders issued under section 2709 and other NSL statutes. Under 3511(a), the recipient of an NSL could petition a district court for an order modifying or setting aside the NSL. The court could modify the NSL, or set it aside, only "if compliance would be unreasonable, oppressive, or otherwise unlawful." 18 U.S.C. § 3511(a) (2011). Under 3511(b)(2), an NSL recipient subject to a nondisclosure order could petition a district court to modify or set aside the nondisclosure order. If the NSL was

nondisclosure provision of the statute was an unconstitutional prior restraint and content-based restriction on speech. More specifically, petitioner contended that the NSL provisions lacked the necessary procedural safeguards required under the First Amendment because the government did not bear the burden to seek judicial review of the nondisclosure order, and the government did not bear the burden of demonstrating that the nondisclosure order was necessary to protect specific, identified interests. Petitioner also argued that the NSL nondisclosure provisions violated the First Amendment because they acted as a licensing scheme providing unfettered discretion to the FBI, and that the judicial review provisions violated separation of powers principles because the statute dictated an impermissibly restrictive standard of review for courts adjudicating challenges to nondisclosure orders. Petitioner also attacked the substantive provisions of the NSL statute itself, both separately and in conjunction with the nondisclosure provisions, arguing that the statute was a content-based restriction on speech that failed strict scrutiny.

In its opposition to the petition, the government argued that the NSL statute satisfied strict scrutiny and did not impinge on the anonymous speech or associational rights of the subscriber whose information was sought in the NSL. The government also asserted that the nondisclosure provisions were appropriately applied to petitioner because the nondisclosure order was not a

---

issued within a year of the time a challenge to the nondisclosure order was made, a court could "modify or set aside such a nondisclosure requirement if it finds that there is no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." 18 U.S.C. § 3511(b) (2011). However, if a specified high ranking government official (i.e., the Attorney General, Deputy or Assistant Attorney Generals, the Director of the Federal Bureau of Investigation, or agency heads) certified that disclosure "may endanger the national security of the United States or interfere with diplomatic relations, such certification shall be treated as conclusive unless the court finds that the certification was made in bad faith." 18 U.S.C. § 3511 (b)(2) (2011).

Under 3511(b)(3), if the petition to modify or set aside the nondisclosure order was filed more than one year after the NSL issued, a specified government official, within ninety days of the filing of the petition, was required to either terminate the nondisclosure requirement or re-certify that disclosure may result in an enumerated harm. 18 U.S.C. § 3511(b)(3) (2011). If the government provided that re-certification, the Court could again only alter or modify the NSL if there was "no reason to believe that disclosure may" result in an enumerated harm, and the court was required to treat the certification as "conclusive unless the court f[ound] that the recertification was made in bad faith." 18 U.S.C. § 3511(b)(3) (2011). Finally, if the court denied a petition for an order modifying or setting aside a nondisclosure order, "the recipient shall be precluded for a period of one year from filing another petition to modify or set aside such nondisclosure requirement." 18 U.S.C. § 3511(b)(3) (2011).

"classic prior restraint" warranting the most rigorous scrutiny and because it was issued after an adequate certification from the FBI. Finally, the government argued that the statutory standard of judicial review of NSLs and nondisclosure orders was constitutional.

In a decision filed on March 14, 2013, this Court found that the NSL nondisclosure and judicial review provisions suffered from significant constitutional infirmities. *In re National Security Letter*, 930 F. Supp. 2d 1064 (N.D. Cal. 2013). The Court first reviewed prior cases testing the constitutionality of the NSL provisions at issue. In *John Doe, Inc. v. Gonzales*, 500 F. Supp. 2d 379 (S.D.N.Y. 2007), affirmed in part and reversed in part and remanded by *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), the district court found that the nondisclosure provision was a prior restraint and a content-based restriction on speech that violated the First Amendment because the government did not bear the burden to seek prompt judicial review of the nondisclosure order. *John Doe, Inc.*, 500 F. Supp. 2d at 406 (relying on *Freedman v. Maryland*, 380 U.S. 51 (1965)).[2] The district court approved allowing the FBI to determine whether disclosure would jeopardize national security, finding that the FBI's discretion in certifying a need for nondisclosure of an NSL "is broad but not inappropriately so under the circumstances" of protecting national security. *Id.* at 408-09. However, the district court determined that section 3511(b)'s restriction on when a court may alter or set aside an NSL – only if there was "no reason to believe" that disclosure would result in one of the enumerated harms – in combination with the statute's direction that a court must accept the FBI's certification of harm as "conclusive unless the court finds that the certification was made in bad faith," were impermissible attempts to restrict judicial review in violation of separation of powers principles. *Id.* at 411-13. The district court

---

[2] In *Freedman*, the Supreme Court evaluated a motion picture censorship statute that required an owner or lessee of a film to submit the film to the Maryland State Board of Censors and obtain its approval prior to showing the film. 380 U.S. at 52. The Court held that such a review process "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. "*Freedman* identified three procedural requirements: (1) any restraint imposed prior to judicial review must be limited to 'a specified brief period'; (2) any further restraint prior to a final judicial determination must be limited to 'the shortest fixed period compatible with sound judicial resolution'; and (3) the burden of going to court to suppress speech and the burden of proof in court must be placed on the government." *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 871 (2d Cir. 2008) (quoting *Freedman*, 380 U.S. at 58–59) (numbering and ordering follows Supreme Court's discussion of *Freedman* in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990)).

found that the unconstitutional nondisclosure provisions were not severable from the substantive provisions of the NSL statute, and declined to address whether the unconstitutional judicial review provision – which implicated review of other NSLs, not just NSLs to electronic communication service providers at issue – was severable.

The district court's decision was affirmed in part, reversed in part, and remanded by the Second Circuit Court of Appeals in *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). In that case, the Second Circuit found that while not a "classic prior restraint" or a "broad" content-based prohibition on speech necessitating the "most rigorous First Amendment scrutiny," the nondisclosure requirement was sufficiently analogous to them to justify the application of the procedural safeguards announced in *Freedman v. Maryland*, 380 U.S. 51, particularly the third *Freedman* prong requiring the government to initiate judicial review. *Id.* at 881. However, in order to avoid the constitutional deficiencies, the Second Circuit read into the statute a "reciprocal notice" requirement that the government inform each NSL recipient that the recipient could object to the nondisclosure requirements, and if contested, the government would initiate judicial review within 30 days, and that such review would conclude within 60 days. The Second Circuit held that by "conforming" section 2709(c) in this manner, the *Freedman* concerns were met.

The Second Circuit also found problematic the statutory restrictions on the district court's review of the adequacy of the FBI's justification for nondisclosure orders. In order to avoid some of the problems, the Second Circuit accepted three concessions by the government that narrowed the operation of sections 2709(c) and 3511(b) in significant respects. First, the Second Circuit accepted the government's position – offered in litigation – that the section 2709(c) nondisclosure requirement applied only if the FBI certified that an enumerated harm related to an authorized investigation to protect against international terrorism or clandestine intelligence activity may occur. *Id.* at 875. Second, the Second Circuit accepted the government's litigation position that section 3511(b)(2)'s requirement that a court may alter or modify the nondisclosure agreement only if there "is no reason to believe that disclosure may" risk one of the enumerated harms, should be read to mean that a court may alter or modify the nondisclosure agreement unless there is "some reasonable likelihood" that the enumerated harm will occur. Third, the Second Circuit

accepted the government's agreement that it would bear the burden of proof to persuade a district court – through evidence submitted in camera as necessary – that there was a good reason to believe that disclosure may risk one of the enumerated harms, and that the district court must find that such a good reason exists. *Id.* at 875-76.

In interpreting section 3511(b) to require the government to show a "good" reason that an enumerated harm related to international terrorism or clandestine intelligence activity may result, and requiring the government to submit proof to the district court to support its certification, the Second Circuit found that a court would have – consistent with its duty independently to assess First Amendment restraints in light of national security concerns – "a basis to assure itself (based on in camera presentations where appropriate) that the link between the disclosure and risk of harm is substantial." *Id.* at 881. After implying these limitations – based on the government's litigation concessions – the Second Circuit found that most of the significant constitutional deficiencies found by the district court could be avoided. However, the Second Circuit affirmed the lower court's holding that section 3511(b)(2) and (b)(3)'s provision that government certifications must be treated as "conclusive" is not "meaningful judicial review" as required by the First Amendment. *Id.* at 882. In conclusion, the Second Circuit severed the conclusive presumption provision of section 3511(b), but left intact the remainder of section 3511(b) and the entirety of section 2709, with the added imposed limitations and "with government-initiated review as required." *Id.* at 885.

In this Court's March 13, 2013 decision, the Court largely agreed with the analysis of the Second Circuit in *John Doe, Inc. v. Mukasey*, and held that although section 2709(c) did not need to satisfy the "extraordinarily rigorous" *Pentagon Papers* test,[3] section 2709(c) must still meet the

[3] In *New York Times v. United States (Pentagon Papers)*, 403 U.S. 713 (1971) (per curiam), the Supreme Court denied the United States' request for an injunction enjoining the *New York Times* and the *Washington Post* from publishing a classified government study. Citing Justice Stewart's concurrence, petitioners have contended throughout this litigation that the nondisclosure provisions are constitutional only if the government can show that disclosure of the information will "surely result in direct, immediate, and irreparable harm to our Nation or its people." *Id.* at 730 (Stewart, J., joined by White, J., concurring). As explained in the Court's 2013 decision and this decision, the Court concludes that the *Pentagon Papers* test does not apply to the NSL nondisclosure requirements.

heightened justifications for sustaining prior-restraints announced in *Freedman v. Maryland*, and must be narrowly tailored to serve a compelling government interest.

This Court found that section 2709 did not satisfy the *Freedman* procedural safeguards because the NSL provisions did not require the government to initiate judicial review of NSL disclosure orders. This Court also found that the NSL nondisclosure provisions were not narrowly tailored on their face, since they applied without distinction to prohibiting disclosures regarding the content of the NSLs as well as to the very fact of having received an NSL. This Court also held that section 3511(b) violated the First Amendment and separation of powers principles because the statute impermissibly attempted to circumscribe a court's ability to review the necessity of nondisclosure orders. This Court found that it was not within its power to "conform" the NSL nondisclosure provisions as the Second Circuit had. This Court therefore held the NSL statutes unconstitutional, denied the government's request to enforce the NSL at issue in 3:11-cv-2173 SI, and enjoined the government from issuing NSLs. This Court stayed enforcement of its decision pending appeal to the Ninth Circuit.

In 2013, petitioner A received two additional NSLs and on April 23, 2013, petitioner A filed another petition to set aside those NSLs on same constitutional grounds raised in the 2011 petition. *In re NSLs*, 3:13-mc-80089 SI. In addition, two other recipients of NSLs filed lawsuits in this Court seeking to set aside the NSLs on the basis of the First Amendment and separation of powers. *See In re NSLs*, 3:13-cv-1165 SI (petition challenging 2 NSLs) and *In re NSLs*, 3:13-mc-80063 SI (petition challenging 19 NSLs).[4]

In three separate orders filed on May 21, 2013, August 12, 2013, and August 13, 2013, this Court found that in light of the pending appeal and stay of the judgment in *In re NSLs*, 3:11-cv-2173 SI, it was appropriate to review the arguments and evidence on an NSL-by-NSL basis. In determining whether to enforce the challenged NSLs, the Court reviewed classified and unclassified evidence submitted by the government. The Court found that the government demonstrated that the NSLs were issued in full compliance with the procedural and substantive

[4] The Court will refer to the petitioner in *In re NSLs*, 3:13-cv-1165 SI as petitioner B and the petitioner in *In re NSLs*, 3:13-mc-80063 SI as petitioner C.

requirements imposed by the Second Circuit in *John Doe, Inc. v. Mukasey*. Specifically, the Court found that the government had: (1) notified the NSL recipients that the government would initiate judicial review of the nondisclosure order and the underlying NSL if the recipient objected to compliance; (2) certified that the nondisclosure orders were necessary to prevent interference with an authorized investigation to protect against international terrorism or clandestine intelligence agencies; and (3) submitted evidence to showing there was a "good reason" to believe that absent nondisclosure, some reasonable likelihood of harm to an authorized investigation to protect against international terrorism or clandestine intelligence agencies would result. The Court also found that the Court was not expected to treat the FBI's certification as to the necessity of the nondisclosure as conclusive, but to conduct a searching review of the evidence submitted. *See* Dkt. No. 27 in 3:13-mc-80063 SI (May 21, 2013 Order); Dkt. No. 13 in 3:13-cv-1165 SI (August 12, 2013 Order); Dkt. No. 20 in 3:13-mc-80089 SI (August 13, 2013 Order). The Court denied the petitioners' petitions to set aside the NSLs challenged in 3:13-mc-80089 SI, 3:13-mc-80063 SI, and 3:13-cv-1165 SI, and granted the government's motions to enforce those NSLs. The petitioners in those cases unsuccessfully sought stays of the enforcement orders, and thereafter complied with the information requests and the nondisclosure requirements of all of the NSLs.[5] The petitioner in 3:13-mc-80063 SI did not file an appeal. The parties in 3:11-cv-2173 SI, 3:13-mc-80089 SI and 3:13-cv-1165 SI filed appeals, and those appeals were consolidated before the Ninth Circuit.

The consolidated appeals were submitted for decision following oral argument on October 8, 2014. On June 2, 2015, while the consolidated appeals were pending before the Ninth Circuit, Congress amended 18 U.S.C. §§ 2709 and 3511 through the passage of the USA Freedom Act of 2015 ("USAFA"), Pub. L. No. 114-23, 129 Stat. 268 (2015). In June 2015, the Ninth Circuit ordered the parties to file supplemental briefing regarding the impact of the amendments on the appeals. On August 24, 2015, the Ninth Circuit issued an order stating "[i]n light of the significant

[5] In a few instances, the government withdrew the information requests for particular NSLs, but the government did not withdraw any of the nondisclosure requirements for any of the NSLs.

changes to the statutes, we conclude that a remand to the district court is appropriate since the district court may address the recipients' challenges to the revised statutes." The Ninth Circuit vacated the judgments in the consolidated appeals and remanded to this Court for further proceedings.

II. 2015 Amendments to NSL Statutes

The legislative history of the USAFA states that section 502, titled "Limitations on Disclosure of National Security Letters," "corrects the constitutional defects in the issuance of NSL nondisclosure orders found by the Second Circuit Court of Appeals in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and adopts the concepts suggested by that court for a constitutionally sound process." H.R. Rep. No. 114-109, at 24 (2015).

A. Section 2709

The USAFA amended sections 2709(b) and (c), and added new subsection (d). As amended, section 2709(b)(1) provides that an NSL is authorized only when a specified FBI official provides a certification that "us[es] a term that specifically identifies a person, entity, telephone number, or account as the basis for [the NSL]," 18 U.S.C. § 2709(b) (2016).[6] Section 2709(c) now requires the government to provide the NSL recipient with notice of the right to judicial review as a condition of prohibiting disclosure of the receipt of the NSL. *See* 18 U.S.C. § 2709(c)(1)(A) (2016). Similarly, new subsection (d) requires that an NSL notify the recipient that judicial review is available pursuant to 18 U.S.C. § 3511. *See* 18 U.S.C. § 2709(d) (2016). Second, the amended statute now permits the government to modify or rescind a nondisclosure requirement after an NSL is issued. *See* 18 U.S.C. § 2709(c)(2)(A)(iii) (2016). Finally, under the

[6] The legislative history regarding this amendment states, "This section prohibits the use of various national security letter (NSL) authorities (contained in the Electronic Communications Privacy Act, Right to Financial Privacy Act, and Fair Credit Reporting Act) without the use of a specific selection term as the basis for the NSL request. It specifies that for each NSL authority, the government must specifically identify the target or account." H.R. Rep. No. 114-109, at 24 (discussing § 501 of USAFA).

amended section 2709(c), the recipient of an NSL containing a nondisclosure requirement "may disclose information . . . to . . . other persons as permitted by the Director of the [FBI] or the designee of the Director." 18 U.S.C. §§ 2709(c)(2)(A)(iii); 2709(c)(2)(D) (2016).

As amended by the USAFA, section 2709, titled "Counterintelligence access to telephone toll and transactional records," now states in full:

> (a) Duty to provide.--A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.
>
> (b) Required certification.--The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, may, using a term that specifically identifies a person, entity, telephone number, or account as the basis for a request--
>
> (1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and
>
> (2) request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.
>
> (c) Prohibition of certain disclosure.--
>
> (1) Prohibition.--
>
> (A) In general.--If a certification is issued under subparagraph (B) and notice of the right to judicial review under subsection (d) is provided, no wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, shall disclose to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section.
>
> (B) Certification.--The requirements of subparagraph (A) shall apply if the Director of the Federal Bureau of Investigation, or a designee of the Director whose rank shall be no lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in

Charge of a Bureau field office, certifies that the absence of a prohibition of disclosure under this subsection may result in--

(i) a danger to the national security of the United States;

(ii) interference with a criminal, counterterrorism, or counterintelligence investigation;

(iii) interference with diplomatic relations; or

(iv) danger to the life or physical safety of any person.

(2) Exception.--

(A) In general.--A wire or electronic communication service provider that receives a request under subsection (b), or officer, employee, or agent thereof, may disclose information otherwise subject to any applicable nondisclosure requirement to--

(i) those persons to whom disclosure is necessary in order to comply with the request;

(ii) an attorney in order to obtain legal advice or assistance regarding the request; or

(iii) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.

(B) Application.--A person to whom disclosure is made under subparagraph (A) shall be subject to the nondisclosure requirements applicable to a person to whom a request is issued under subsection (b) in the same manner as the person to whom the request is issued.

(C) Notice.--Any recipient that discloses to a person described in subparagraph (A) information otherwise subject to a nondisclosure requirement shall notify the person of the applicable nondisclosure requirement.

(D) Identification of disclosure recipients.--At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request.

(d) Judicial review.--

(1) In general.--A request under subsection (b) or a nondisclosure requirement imposed in connection with such request under subsection (c) shall be subject to judicial review under section 3511.

> (2) Notice.--A request under subsection (b) shall include notice of the availability of judicial review described in paragraph (1).

18 U.S.C. § 2709 (2016).

B. Section 3511

Section 502(g) of the USAFA amends section 3511(d) to codify a version of the reciprocal notice procedure for NSL disclosure requirements that the Second Circuit held in *John Doe, Inc. v. Mukasey* would be constitutional. As amended, section 3511(b) provides that "[i]f a recipient of [an NSL] wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the Government or file a petition for judicial review in any court . . . ." 18 U.S.C. § 3511(b)(1)(A) (2016). If the recipient notifies the government that it objects to or wishes to have a court review the nondisclosure requirement, the government must apply for a nondisclosure order within 30 days. *Id.* § 3511(b)(1)(B) (2016). The amended statute requires the district court to "rule expeditiously," and if the court determines that the requirements for nondisclosure are met, it shall "issue a nondisclosure order that includes conditions appropriate to the circumstances." *Id.* § 3511(b)(1)(C) (2016).[7] The amended statute also provides that a recipient of an NSL "may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the request[,]" and that "[t]he court may modify or set aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful." *Id.* at § 3511(a) (2016).

In addition, amended section 3511(b) requires that in the event of judicial review, the government's application for a nondisclosure order must be accompanied by a certification from a specified government official "containing a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection may result in-- (A) a danger to the national

[7] As discussed *infra*, the statutory requirement of "expeditious" judicial review differs from the reciprocal notice procedure discussed in *John Doe, Inc. v. Mukasey*, in that in *Doe*, the Second Circuit stated its view that if the government used a reciprocal notice procedure as a means of initiating judicial review and judicial review was sought, a court would have 60 days to adjudicate the merits, unless special circumstances warranted additional time. *See John Doe, Inc.*, 549 F.3d at 883. Petitioners contend that the amended statute is deficient because it does not mandate a specific time period for the conclusion of judicial review.

security of the United States; (B) interference with a criminal, counterterrorism, or counterintelligence investigation; (C) interference with diplomatic relations; or (D) danger to the life or physical safety of any person." 18 U.S.C. § 3511(b)(2) (2016). The statute provides that the district court "shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in" one of the enumerated harms. *Id.* § 3511(b)(3) (2016). The USAFA repealed the provision formerly contained in section 3511(b)(2)-(3) that gave conclusive effect to good faith certifications by specified government officials. *See* H.R. Rep. No. 114-109, at 24 ("This section repeals a provision stating that a conclusive presumption in favor of the government shall apply where a high-level official certifies that disclosure of the NSL would endanger national security or interfere with diplomatic relations."). The USAFA also repealed the provision formerly set forth in section 3511(b)(3) under which an NSL recipient who unsuccessfully challenged a nondisclosure requirement a year or more after the issuance of the NSL was required to wait one year before seeking further judicial relief.

As amended by the USAFA, 18 U.S.C. § 3511, titled "Judicial review of requests for information," now provides,

> (a) The recipient of a request for records, a report, or other information under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947 may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the request. The court may modify or set aside the request if compliance would be unreasonable, oppressive, or otherwise unlawful.
>
> (b) Nondisclosure.--
>
> (1) In general.--
>
> (A) Notice.--If a recipient of a request or order for a report, records, or other information under section 2709 of this title, section 626 or 627 of the Fair Credit Reporting Act (15 U.S.C. 1681u and 1681v), section 1114 of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414), or section 802 of the National Security Act of 1947 (50 U.S.C. 3162), wishes to have a court review a nondisclosure requirement imposed in connection with the request

or order, the recipient may notify the Government or file a petition for judicial review in any court described in subsection (a).

(B) Application.--Not later than 30 days after the date of receipt of a notification under subparagraph (A), the Government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant request or order. An application under this subparagraph may be filed in the district court of the United States for the judicial district in which the recipient of the order is doing business or in the district court of the United States for any judicial district within which the authorized investigation that is the basis for the request is being conducted. The applicable nondisclosure requirement shall remain in effect during the pendency of proceedings relating to the requirement.

(C) Consideration.--A district court of the United States that receives a petition under subparagraph (A) or an application under subparagraph (B) should rule expeditiously, and shall, subject to paragraph (3), issue a nondisclosure order that includes conditions appropriate to the circumstances.

(2) Application contents.--An application for a nondisclosure order or extension thereof or a response to a petition filed under paragraph (1) shall include a certification from the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the Federal Bureau of Investigation, or a designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director, or in the case of a request by a department, agency, or instrumentality of the Federal Government other than the Department of Justice, the head or deputy head of the department, agency, or instrumentality, containing a statement of specific facts indicating that the absence of a prohibition of disclosure under this subsection may result in--

(A) a danger to the national security of the United States;

(B) interference with a criminal, counterterrorism, or counterintelligence investigation;

(C) interference with diplomatic relations; or

(D) danger to the life or physical safety of any person.

(3) Standard.--A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in--

(A) a danger to the national security of the United States;

(B) interference with a criminal, counterterrorism, or counterintelligence investigation;

(C) interference with diplomatic relations; or

(D) danger to the life or physical safety of any person.

18 U.S.C. 3511(a)-(b) (2016).

C. Other Provisions of USAFA

The USAFA includes two other provisions that are relevant to this litigation. First, section 502(f) requires the Attorney General to adopt procedures to require "the review at appropriate intervals" of nondisclosure requirements issued pursuant to amended section 2709 "to assess whether the facts supporting nondisclosure continue to exist." USAFA § 502(f)(1)(A), Pub. L. No. 114-23, 129 Stat 268, at 288 (2015). On November 24, 2015, the Attorney General adopted "Termination Procedures for National Security Letter Nondisclosure Requirement."[8] Those procedures provide:

> **III. Review Procedures**
>
> **A. Timeframe for Review**
>
> Under these NSL Procedures, the nondisclosure requirement of an NSL shall terminate upon the closing of any investigation in which an NSL containing a nondisclosure provision was issued except where the FBI makes a determination that one of the existing statutory standards for nondisclosure is satisfied. The FBI also will review all NSL nondisclosure determinations on the three-year anniversary of the initiation of the full investigation and terminate nondisclosure at that time, unless the FBI determines that one of the statutory standards for nondisclosure is satisfied. When, after the effective date of these procedures, an investigation closes and/or reaches the three-year anniversary of the initiation of the full investigation, the agent assigned to the investigation will receive notification, automatically generated by FBI's case management system, indicating that a review is required of the continued need for nondisclosure for all NSLs issued in the case that included a nondisclosure requirement. Thus, for cases that close after the three-year anniversary of the full investigation, the NSLs that continue to have nondisclosure requirements will be reviewed on two separate occasions; cases that close before the three-year anniversary of the full investigation will be reviewed on one occasion. Moreover, NSL nondisclosure requirements will be reviewed only if they are associated with investigations that close and/or reach their three-year anniversary date on or after the effective date of these procedures.
>
> **B. Review Requirements**
>
> The assessment of the need for continued nondisclosure of an NSL is an individualized one; that is, each NSL issued in an investigation will need to be individually reviewed to determine if the facts no longer support nondisclosure

[8] The procedures are available at https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-letter-nondisclosure-requirement-1. The procedures became effective 90 days after they were adopted by the Attorney General, or February 22, 2016.

under the statutory standard for imposing a nondisclosure requirement when an NSL is issued—i.e., where there is good reason to believe disclosure may endanger the national security of the United States; interfere with a criminal, counterterrorism, or counterintelligence investigation; interfere with diplomatic relations; or endanger the life or physical safety of any person. *See, e.g.*, 18 U.S.C. § 2709(c). This assessment must be based on current facts and circumstances, although agents may rely on the same reasons used to impose a nondisclosure requirement at the time of the NSL's issuance where the current facts continue to support those reasons. If the facts no longer support the need for nondisclosure of an NSL, the nondisclosure requirement must be terminated.

Every determination to continue or terminate the nondisclosure requirement will be subject to the same review and approval process that NSLs containing a nondisclosure requirement are subject to at the time of their issuance. Thus, (i) the case agent will review the NSL, the original written justification for nondisclosure, and any investigative developments to determine whether nondisclosure should continue; (ii) the case agent will document the reason for continuing or terminating the nondisclosure requirement; (iii) the case agent's immediate supervisor will review and approve the case agent's written justification for continuing or terminating nondisclosure; (iv) an attorney—either the Chief Division Counsel or Associate Division Counsel in the relevant field office or an attorney with the National Security Law Branch at FBIHQ—will review and approve the case agent's written justification for continuing or terminating nondisclosure; (v) higher-level supervisors—either the Assistant Special Agent in Charge in the field or the Unit Chief or Section Chief at FBIHQ—will review and approve the case agent's written justification for continuing or terminating nondisclosure; and (vi) a Special Agent in Charge or a Deputy Assistant Director at FBIHQ will review and make the final determination regarding the case agent's written justification for continuing or terminating nondisclosure. In addition, those NSLs for which the nondisclosure requirement is being terminated will undergo an additional review at FBIHQ for consistency across field offices and programs. This review process must be completed within 30 days from the date of the review notice given by the FBI's case management system.

C. Notification of Termination

Upon a decision that nondisclosure of an NSL is no longer necessary, written notice will be given to the recipient of the NSL, or officer, employee, or agent thereof, as well as to any applicable court, as appropriate, that the nondisclosure requirement has been terminated and the information contained in the NSL may be disclosed. Any continuing restrictions on disclosure will be noted in the written notice. If such a termination notice is to be provided to a court, the FBI field office or FBIHQ Division that issued the NSL, in conjunction with FBI's Office of General Counsel, shall coordinate with the Department of Justice to ensure that notice concerning termination of the NSL nondisclosure requirement is provided to the court and any other appropriate parties.

. . .

Second, section 604 of the USAFA, titled "Public Reporting by Persons Subject to Orders," sets forth a structure by which persons subject to nondisclosure orders or requirements accompanying an NSL may make public disclosures regarding the national security process. A

recipient may publicly report, semi-annually, the number of national security letters received in bands of 100 starting with 0-99, in bands of 250 starting with 0-249, in bands of 500 starting with 0-499, or in bands of 1000, starting with 0-999. *See* USAFA § 604(a), Pub. L. No. 114-23, 129 Stat. 268 (2015); 50 U.S.C. § 1874(a) (2016).

DISCUSSION

I. Level of Scrutiny

The parties dispute what level of scrutiny the Court should apply when analyzing the NSL statutes.[9] The Court notes that the parties largely repeat the same arguments that they advanced to this Court in prior briefing on this issue. Petitioners again contend that the nondisclosure orders amount to a classic prior restraint on speech because they prohibit recipients of an NSL from speaking not just about the NSL's contents and target, but even about the existence or receipt of the NSL. *See, e.g., Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term 'prior restraint' is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4-14 (1984))). Petitioners argue that, as a "classic" prior restraint, the statute can only be saved if disclosure of the information from NSLs will "surely result in direct, immediate, and irreparable damage to our Nation or its people." *New York Times Co. v. United States* (*Pentagon Papers*), 403 U.S. 713, 730 (1971) (Stewart, J., joined by White, J.

[9] The parties also dispute whether the Court should engage in a facial analysis of the amended statutes, or limit its review to an as-applied challenge. At the hearing on this matter, the Court asked the parties to articulate the practical difference between these two approaches in light of the Ninth Circuit's instruction to this Court to address petitioners' "challenges to the revised statutes." The principal difference the parties identified was whether the Court would review the Attorney General's recently promulgated "Termination Procedures for National Security Letter Nondisclosure Requirement," because it was unclear (until the hearing) whether those procedures applied to petitioners' NSLs, since those NSLs were issued in 2011 and 2013. The government stated that because the investigations associated with petitioners' NSLs are still ongoing, the procedures would apply upon the termination of the investigations. Based upon that representation, the Court will review the Termination Procedures as applied to petitioners. At the hearing, petitioners asserted that there may be NSLs with current nondisclosure requirements that were issued under the prior NSL statutes and that may not be subject to the Termination Procedures. The Court declines to speculate about the existence of any such NSLs, and limits its consideration to the NSLs issued in these cases.

concurring).

Petitioners also contend that the NSL nondisclosure orders are a content-based restriction on speech because they target a specific category of speech – speech regarding the NSL. As a content-based restriction, the nondisclosure provision is "presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992), and can only be sustained if it is "narrowly tailored to promote a compelling Government interest. . . . If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (citation omitted).

The government contends that the amended nondisclosure provisions are akin to grand jury secrecy requirements and therefore do not warrant the most rigorous First Amendment scrutiny. The government also contends that the *Freedman* procedural safeguards do not apply to the amended NSL statutes because "the USAFA . . . has transformed the procedural and substantive protections for NSL recipients from governmental promises of voluntary, nationwide compliance, to statutory protections." Dkt. No. 92 in 3:11-cv-2173 SI at 19 n.15 (internal citation and quotation marks omitted).[10] The government argues that the NSL statutory system is similar to the statute challenged in *Landmark Comm. v. Virginia*, 435 U.S. 829 (1978), which prohibited the disclosure of information about the proceedings of a judicial investigative body and imposed criminal penalties for violation. *See Landmark Comm.*, 435 U.S. at 830. The government asserts that, as in *Landmark*, the NSL statutes do not constitute a prior restraint or attempt to censor the news media or public debate.

The Court finds no reason to deviate from its prior analysis regarding the standard of review. As the Court held in 2013, the Court finds that given the text and function of the NSL

---

[10] Petitioners A and B are represented by the same counsel, and filed virtually identical briefs in the briefing on remand. The main difference in the briefing is that the petitioner's motion in 3:11-cv-2173 SI additionally challenged the "compelled production" provision of section 2709(b) as unconstitutional. (In the Court's 2013 decision, the Court denied the government's motion to enforce the 2011 NSL, and thus on remand, petitioner A challenged both the nondisclosure provisions as well as the statutory authority to request information pursuant to an NSL.) [redacted] the FBI withdrew the information demand accompanying the 2011 NSL, thus mooting those arguments. In the Court's August 12, 2013 order in 3:13-cv-1165 SI, the Court granted the government's motion to enforce the NSLs at issue, and after this Court and the Ninth Circuit denied a stay of that order, petitioner B complied with the NSLs.

statute, petitioners' proposed standards are too exacting. Rather, this Court agrees with the Second Circuit's analysis in *John Doe, Inc. v. Mukasey*:

> Although the nondisclosure requirement is in some sense a prior restraint, . . . it is not a typical example of such a restriction for it is not a restraint imposed on those who customarily wish to exercise rights of free expression, such as speakers in public fora, distributors of literature, or exhibitors of movies. And although the nondisclosure requirement is triggered by the content of a category of information, that category, consisting of the fact of the receipt of an NSL and some related details, is far more limited than the broad categories of information that have been at issue with respect to typical content-based restrictions.

John Doe, Inc., 549 F.3d at 876 (internal citations omitted). The Court also agrees with the Second Circuit's statement that "[t]he national security context in which NSLs are authorized imposes on courts a significant obligation to defer to judgments of Executive Branch officials." *Id.* at 871; *see also Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in . . . national security affairs.")

However, the nondisclosure provision clearly restrains speech of a particular content – significantly, speech about government conduct. *John Doe, Inc.*, 549 F.3d at 876, 878. Under section 2709(c), the FBI has been given the power to determine, on a case-by-case basis, whether to allow NSL recipients to speak about the NSLs. As a result, the recipients are prevented from speaking about their receipt of NSLs and from disclosing, as part of the public debate on the appropriate use of NSLs or other intelligence devices, their own experiences. *See* Dkt. No. 91-2 in 3:11-cv-2173 SI (declaration of [redacted]); Dkt. No. 73 in 3:13-cv-1165 SI (corrected declaration of [redacted]). In these circumstances, the Court finds that while section 2709(c) does not need to satisfy the extraordinarily rigorous *Pentagon Papers* test, section 2709(c) must still meet the heightened justifications for sustaining prior-restraints announced in *Freedman v. Maryland* and must be narrowly tailored to serve a compelling governmental interest. *See John Doe, Inc.*, 549 F.3d at 878 (noting government conceded strict scrutiny applied in that case).

The Court is not persuaded by the government's attempt to avoid application of the *Freedman* procedural safeguards by analogizing to cases which have upheld restrictions on disclosures of information by individuals involved in civil litigation, grand jury proceedings and judicial misconduct investigations. The concerns that justified restrictions on a civil litigant's pre-

trial right to disseminate confidential business information obtained in discovery – a restriction that was upheld by the Supreme Court in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) – are manifestly not the same as the concerns raised in this case. Here, the concern is the government's ability to prevent individuals from speaking out about the government's use of NSLs, a subject that has engendered extensive public and academic debate.

The government's reliance on cases upholding restrictions on witnesses in grand jury or judicial misconduct proceedings from disclosing information regarding those proceedings is similarly misplaced. With respect to grand jury proceedings, the Court notes that the basic presumption in federal court is that grand jury witnesses are not bound by secrecy with respect to the content of their testimony. *See, e.g., In re Grand Jury*, 490 F.3d 978, 985 (D.C. Cir. 2007) ("The witnesses themselves are not under an obligation of secrecy."). While courts have upheld state law restrictions on grand jury witnesses' disclosure of information learned only through participation in grand jury proceedings, those restrictions were either limited in duration or allowed for broad judicial review. *See, e.g., Hoffmann-Pugh v. Keenan*, 338 F.3d 1136, 1140 (10th Cir. 2003) (agreeing state court grand jury witness could be precluded from disclosing information learned through giving testimony, but noting state law provides a mechanism for judicial determination of whether secrecy still required); *cf. Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (interests in grand jury secrecy do not "warrant a permanent ban on the disclosure by a witness of his own testimony once a grand jury has been discharged.").

Importantly, as the Second Circuit recognized, the interests of secrecy inherent in grand jury proceedings arise from the nature of the proceedings themselves, including "enhancing the willingness of witnesses to come forward, promoting truthful testimony, lessening the risk of flight or attempts to influence grand jurors by those about to be indicted, and avoiding public ridicule of those whom the grand jury declines to indict." *John Doe, Inc.*, 549 F.3d at 876. In the context of NSLs, however, the nondisclosure requirements are imposed at the demand of the Executive Branch "under circumstances where the secrecy might or might not be warranted." *Id.* at 877. Similarly, the secrecy concerns which inhere in the nature of judicial misconduct proceedings, as well as the temporal limitations on a witness's disclosure regarding those

proceedings, distinguish those proceedings from section 2709(c). *Id.*

The Court is also not persuaded by the government's contention that *Freedman* should not apply to the revised NSL statutes because the USAFA "has transformed the procedural and substantive protections for NSL recipients from 'governmental promises' of 'voluntary, nationwide compliance,' [quoting *In re NSL*, 930 F. Supp. 2d at 1073-74], to statutory protections." Dkt. No. 92 in 3:11-cv-2173 SI at 19 n.15 (internal citation and quotation marks omitted). *Freedman* holds that where expression is conditioned on governmental permission, the First Amendment generally requires procedural safeguards to protect against censorship. While the USAFA changed the procedures for judicial review and the circumstances under which nondisclosure requirements could be lifted or amended, expression nevertheless remains conditioned on governmental permission.[11] Under the amended statutes, the government is still permitted to impose a nondisclosure requirement on an NSL recipient to prevent the recipient from disclosing the fact that it has received an NSL, as well as from disclosing anything about the information sought by the NSL.

The government also asserts that the amended NSL statutory scheme is akin to the criminal statute challenged in *Landmark Communications v. Virginia*, 435 U.S. 829 (1978). *Landmark Communications* is inapposite. In that case, the question was "whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission." *Id.* at 837. Here, rather than imposing criminal sanctions based on disclosure of information, the statute permits the government to impose a nondisclosure requirement prohibiting speech.

[11] The Court does, however, recognize the differences between licensing schemes such as those at issue in *Freedman*, which always act as a restraint because such systems are applied to all prospective speakers at the time the speaker wishes to speak, and the NSL nondisclosure requirements, which apply at the time the government requests information as part of an investigation and at a time when there is no certainty that a NSL recipient wishes to engage in speech.

II. Procedural Safeguards

Having concluded that the procedural safeguards mandated by *Freedman* should apply to the amended NSL statutes, the question becomes whether those standards are satisfied. *Freedman* requires that "'(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.'" *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 227 (1990) (O'Connor, J., joined by Stevens, and Kennedy, JJ.)).

A. Time Prior to Judicial Review

Under *Freedman*'s first prong, any restraint prior to judicial review can be imposed only for "a specified brief period." *Freedman*, 380 U.S. at 59. Previously, the NSL provisions did not provide any limit to the period of time the nondisclosure order can be in place prior to judicial review. The Second Circuit held that this *Freedman* factor would be satisfied if the government were to notify NSL recipients that if they objected to the nondisclosure order within ten days, the government would seek judicial review of the nondisclosure restriction within thirty days. *John Doe, Inc.*, 549 F.3d at 883.

The amended statute largely incorporates the Second Circuit's suggestions on this point. Section 2709(d)(2) requires that an NSL "include notice of the availability of judicial review," and section 3511(b)(2) provides that if a recipient notifies the government that it wishes to have a court review a nondisclosure requirement, within 30 days "the Government shall apply for an order prohibiting the disclosure of the existence or contents of the relevant request or order." 18 U.S.C. § 2709(d)(2) (2016); 18 U.S.C. § 3511(b)(2) (2016).

Petitioners contend that the amended statute violates the first prong of the *Freedman* test because the statute authorizes gags of indefinite duration unless the recipient takes action by initiating judicial review or by notifying the government of its desire for judicial review. Petitioners argue that the amended statute violates *Freedman*'s admonition that a potential speaker

must be "assured" by the statute that a censor "will, within a specified brief period, either issue a license or go to a court to restrain" the speech at issue. *Freedman*, 380 U.S. at 58-59. As discussed *supra*, because the NSL nondisclosure requirements are not a typical prior restraint, the Court concludes the Constitution does not require automatic judicial review in every instance, provided that NSL recipients are notified that judicial review is available and the *Freedman* procedural safeguards are otherwise met. *See John Doe, Inc.*, 549 F.3d at 879-80 (discussing reciprocal notice procedure and how use of that procedure obviates need for automatic judicial review of every NSL).

The Court further finds that although the amended statute does not include the initial ten day period discussed by the Second Circuit, the amended statute satisfies *Freedman*'s first requirement that any restraint prior to judicial review can be imposed only for "a specified brief period." Under the amended statute, a recipient of an NSL is notified of the availability of judicial review at the same time the recipient receives the NSL. If a recipient wishes to seek prompt review of a nondisclosure order, the recipient can either file a petition or promptly notify the government of its objection, thereby triggering the thirty day period for the government to initiate judicial review. As such, the Court finds that the amended statute complies with *Freedman*'s first requirement.

B. "Expeditious" Judicial Review

Freedman next requires "a prompt final judicial decision" regarding the nondisclosure requirement. *Freedman*, 380 U.S. at 59. Amended section 3511(B)(1)(C) states that a court reviewing nondisclosure requirements "should rule expeditiously." 18 U.S.C. § 3511(b)(1)(C) (2016).

Petitioners contend that the amended statute does not meet the second *Freedman* requirement because there is no specified time period in which a final determination must be made. Petitioners rely on the Second Circuit's holding in *John Doe, Inc.*, that if the government used the Second Circuit's suggested reciprocal notice procedure as a means of initiating judicial review, "time limits on the nondisclosure requirement pending judicial review, as reflected in

Freedman, would have to be applied to make the review procedure constitutional." *John Doe, Inc.*, 549 F.3d at 883. The Second Circuit held, "[w]e would deem it to be within our judicial authority to conform subsection 2709(c) to First Amendment requirements, by limiting the duration of the nondisclosure requirement . . . and a further period of 60 days in which a court must adjudicate the merits, unless special circumstances warrant additional time." *Id.*

Petitioners' arguments about prescribing time limits for the completion of judicial review are not without force. However, although the Second Circuit held that a 60 day time limit for judicial review would meet constitutional standards, the *John Doe, Inc.* court was reviewing the prior version of section 3511 which did not contain the directive that "courts should rule expeditiously." As the government notes, *Freedman* and other Supreme Court cases applying or discussing *Freedman* have held the Constitution requires "prompt" or "expeditious" judicial review. *Freedman*, 380 U.S. at 59; *see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990) (stating *Freedman*'s second prong as requiring "expeditious judicial review of [prior restraint] decision"); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975) (stating under *Freedman* "a prompt final judicial determination must be assured."). In *Freedman*, the Supreme Court held that the Maryland censorship scheme did not satisfy this requirement because the statute only stated that a person could seek judicial review of an adverse decision, without "any assurance of prompt judicial review." 380 U.S. at 54, 59. Here, in contrast, the amended statute directs that courts "should rule expeditiously." 18 U.S.C. § 3511(b)(1)(C) (2016). The Court concludes that the amended statute satisfies the second *Freedman* procedural prong.

C. Government Must Initiate Judicial Review and Bear Burden of Proof

The third *Freedman* safeguard requires the government to bear the burden of seeking judicial review and to bear the burden of proof once in court. *Freedman*, 380 U.S. at 59-60. The Second Circuit found that the absence of a reciprocal notice procedure in the prior version of the NSL statutes rendered them unconstitutional, but suggested that if the government were to inform recipients that they could object to the nondisclosure order, and that if they objected, the government would seek judicial review, then the constitutional problem could be avoided. *John*

Doe, Inc.,, 549 F.3d at 879-80. The amended statutes now incorporate this reciprocal notice procedure. *See* 18 U.S.C. §§ 2709(c)(1)(A); 2709(d)(2) (2016) (requiring notice of the availability of judicial review); 18 U.S.C. § 3511(b)(1)(A)-(C) (2016) (initiating judicial review through reciprocal notice and imposing 30-day requirement on government).

Petitioners argue that the amended statute places an impermissible burden on invoking judicial review because recipients need to notify the FBI of an objection in order to trigger judicial review. Petitioners' principal complaint is that the amended statute does not require automatic judicial review of every NSL, a contention that the Court has already addressed. *See also John Doe, Inc.*, 549 F.3d at 879-80. The Court also finds that notifying the government of an objection is not a substantial burden, and that the relevant burden is "the burden of instituting judicial proceedings," which is placed on the government. *See Freedman*, 380 U.S. at 59; *see also Southeastern Promotions, Ltd.*, 420 U.S. at 560; *see also id.* at 561 (holding municipal board's rejection of application to use public theater for showing of rock musical "Hair" did not meet *Freedman*'s procedural requirements because, *inter alia*, "[t]hroughout [the process], it was petitioner, not the board, that bore the burden of obtaining judicial review."). Here, if a recipient notifies the government of an objection, the burden of seeking judicial review is upon the government. Petitioners also assert that the amended statute is deficient because the government can choose to ignore its obligation to initiate judicial review. However, petitioners' assertion is speculative, and the record before the Court shows that the government promptly sought judicial review with respect to the NSLs at issue.[12]

III. Judicial Review

The prior version of section 3511(b) provided that a court could modify or set aside a nondisclosure requirement only if the court found there was "no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or

[12] The question of which party bears the burden of proof is related to the issue of judicial review, and thus the Court discusses the two issues together *infra*.

endanger the life or physical safety of any person." 18 U.S.C. § 3511(b)(2-(3) (2014). If the FBI certified that such a harm "may" occur, the district court was required to accept that certification as "conclusive." *Id.*

This Court found that the prior version of section 3511(b) impermissibly restricted the scope of judicial review. The Court held that "[t]he statute's intent – to circumscribe a court's ability to modify or set aside nondisclosure NSLs unless the essentially insurmountable 'no reason to believe' that a harm 'may' result is satisfied – is incompatible with the court's duty to searchingly test restrictions on speech." *In re National Sec. Letter*, 930 F. Supp. 2d at 1077-78. The Court agreed with the government that "in light of the national security context in which NSLs are issued, a highly deferential standard of review is not only appropriate but necessary." *Id.* at 1078. However, the Court found that deference to the government's national security determinations "must be based on a reasoned explanation from an official that directly supports the assertion of national security interests." *Id.* The Court also agreed with the Second Circuit that the statute's direction that courts treat the government's certification as "conclusive" was also unconstitutional.

The amended statute now states, "A district court of the United States shall issue a nondisclosure order or extension thereof under this subsection if the court determines that there is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in-- (A) a danger to the national security of the United States; (B) interference with a criminal, counterterrorism, or counterintelligence investigation; (C) interference with diplomatic relations; or (D) danger to the life or physical safety of any person." 18 U.S.C. § 3511(b)(3) (2016). Section 3511(b)(2) now requires the government's application for nondisclosure order to include a certification from a specified government official that contains "a statement of specific facts indicating that the absence of a prohibition on disclosure may result in" an enumerated harm. In addition, through the USAFA Congress eliminated the "conclusive" nature of certain certifications by certain senior officials.

The Court concludes that as amended, section 3511 complies with constitutional requirements and cures the deficiencies previously identified by this Court. Section 3511 no longer contains the "essentially insurmountable" standard providing that a court could modify or

set aside a nondisclosure requirement only if the court found there was "no reason to believe" that disclosure may result in an enumerated harm. The government argues, and the Court agrees, that in the USAFA, Congress implicitly ratified the Second Circuit's interpretation of section 3511 as "plac[ing] on the Government the burden to persuade a district court that there is a good reason to believe that disclosure may risk one of the enumerated harms, and that a district court, in order to maintain a nondisclosure order, must find that such a good reason exists." *John Doe, Inc.*, 549 F.3d at 875-76.[13] This conclusion is supported by the legislative history of the USAFA, which states that section 502 of the USAFA (which amended section 3511 as well as section 2709), "corrects the constitutional defects in the issuance of NSL nondisclosure orders found by the Second Circuit Court of Appeals in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and adopts the concepts suggested by that court for a constitutionally sound process." H.R. Rep. No. 114-109, at 24 (2015); *see also Midatlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot.*, 474 U.S. 494, 501 (1986) (citing the "normal rule of statutory construction" that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ."); *United States v. Lincoln*, 277 F.3d 1112, 1114 (9th Cir. 2002) (where Ninth Circuit had previously interpreted statutory definition of "victim" to include the United States and Congress amended that definition without excluding the United States, the court "inferred that Congress adopted the judiciary's interpretation.").[14]

---

[13] In so interpreting the pre-USAFA version of section 3511, the Second Circuit accepted the government's concessions that (1) "'reason' in the quoted phrase means 'good reason'"; and (2) "the statutory requirement of a finding that an enumerated harm 'may result' to mean more than a conceivable possibility. The upholding of nondisclosure does not require the certainty, or even the imminence of, an enumerated harm, but some reasonable likelihood must be shown." *Id.* at 875.

[14] The Court notes that the "good reason" standard is also discussed in the Attorney General's recently promulgated "Termination Procedures for National Security Letter Nondisclosure Requirement." Those procedures state, *inter alia*, "The FBI may impose a nondisclosure requirement on the recipient of an NSL only after certification by the head of an authorized investigative agency, or an appropriate designee, that one of the statutory standards for nondisclosure is satisfied; that is, *where there is good reason to believe* disclosure may endanger the national security of the United States; interfere with a criminal, counterterrorism, or counterintelligence investigation; interfere with diplomatic relations; or endanger the life or

Petitioners contend that even if the amended statute could be interpreted as requiring the government to demonstrate that there is a "good reason" to believe that disclosure of the information may result in an enumerated harm, the standard of review is "excessively deferential" because the "may result" standard in section 3511(b)(3) is incompatible with the First Amendment's requirement that restrictions on speech be "necessary." However, as the Second Circuit held, "[t]he upholding of nondisclosure does not require the certainty, or even the imminence of, an enumerated harm, but some reasonable likelihood must be shown." *John Doe, Inc.*, 549 F.3d at 875. This reasonable likelihood standard is incorporated by the USAFA, *see* H.R. Rep. No. 114-109, at 24 (2015), and the Court concludes that this standard is sufficient. Further, a court will be able to engage in meaningful review of a nondisclosure requirement because under the amended statute, the government is required to provide "a statement of specific facts indicating that the absence of a prohibition on disclosure may result in" an enumerated harm, and courts are no longer required to treat the government's certification as "conclusive." 18 U.S.C. § 3511(b)(2) (2016).

V. Narrowly Tailored to Serve a Compelling Governmental Interest

As content-based restrictions on speech, the NSL nondisclosure provisions must be narrowly tailored to serve a compelling governmental interest. It is undisputed that "no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). The question is whether the NSL nondisclosure provisions are sufficiently narrowly tailored to serve that compelling interest without unduly burdening speech.

The Court previously found that the NSL nondisclosure provisions were not narrowly tailored on their face, since they applied, without distinction, to both the content of the NSLs and to the very fact of having received one. The Court found it problematic that the statute did not distinguish – or allow the FBI to distinguish – between a prohibition on disclosing mere receipt of an NSL and disclosing the underlying contents. The Court was also concerned about the fact that

---

physical safety of any person." https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-letter-nondisclosure-requirement-1.

nothing in the prior statute required or even allowed the government to rescind the non-disclosure order once the impetus for it had passed. Instead, the review provisions required the recipient to file a petition asking the Court to modify or set aside the nondisclosure order. *See* 18 U.S.C. § 3511(b) (2014). The Court also found problematic the fact that if a recipient sought review, and the court declined to modify or set aside the nondisclosure order, a recipient was precluded from filing another petition to modify or set aside for a year, even if the need for nondisclosure would cease within that year. 18 U.S.C. § 3511(b)(3) (2014).

The Court concludes that the amendments to section 3511 addressed the Court's concerns. 18 U.S.C. § 3511(b)(1)(C) now provides that upon review, a district court may "issue a nondisclosure order that includes conditions appropriate to the circumstances." 18 U.S.C. § 3511(b)(1)(C) (2016). At the hearing, the government stated that "conditions appropriate to the circumstances" could include a temporal limitation on nondisclosure, as well as substantive conditions regarding what information, such as the identity of the recipient or the contents of the subpoena, is subject to the nondisclosure order. The amended statutes also now authorize the Director of the FBI to permit additional disclosures concerning NSLs. *See* 18 U.S.C. §§ 2709(c)(2)(A)(iii) (2016) (recipient of NSL "may disclose information otherwise subject to any applicable nondisclosure requirement to . . . other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director.")[15]; 18 U.S.C. § 2709(c)(2)(D) ("At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under clause (i) or (iii) of subparagraph (A) shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request."). In addition, Congress eliminated the provision that precluded certain NSL recipients from challenging a nondisclosure requirement more than once per year. USAFA § 502(f)(1), Pub. L. No. 114-23, 129 Stat. 268 (2015).

[15] The prior version of section 2709(c) permitted NSL recipients to disclose that they had received an information request to (1) parties necessary to comply with the request and (2) an attorney to obtain legal advice or legal assistance regarding the request. 18 U.S.C. § 2709(c) (2014).

In addition, on November 24, 2015, pursuant to section 502(f) of the USAFA, the Attorney General adopted "Termination Procedures for National Security Letter Nondisclosure Requirement." https://www.fbi.gov/about-us/nsb/termination-procedures-for-national-security-letter-nondisclosure-requirement-1. The procedures require the FBI to re-review the need for the nondisclosure requirement of an NSL three years after the initiation of a full investigation and at the closure of the investigation, and to terminate the nondisclosure requirement when the facts no longer support nondisclosure. These procedures apply to investigations that close or reach their three year anniversary on or after the effective date of the procedures. At the hearing in this case, the government stated that the investigations related to the NSLs issued to petitioners all remain open, and thus the procedures would apply when (and if) the investigations are closed.[16] The procedures state, *inter alia*,

> The assessment of the need for continued nondisclosure of an NSL is an individualized one; that is, each NSL issued in an investigation will need to be individually reviewed to determine if the facts no longer support nondisclosure under the statutory standard for imposing a nondisclosure requirement when an NSL is issued—i.e., where there is good reason to believe disclosure may endanger the national security of the United States; interfere with a criminal, counterterrorism, or counterintelligence investigation; interfere with diplomatic relations; or endanger the life or physical safety of any person. *See, e.g.*, 18 U.S.C. § 2709(c). This assessment must be based on current facts and circumstances, although agents may rely on the same reasons used to impose a nondisclosure requirement at the time of the NSL's issuance where the current facts continue to support those reasons. If the facts no longer support the need for nondisclosure of an NSL, the nondisclosure requirement must be terminated.

Id.

Petitioners do not raise any specific challenge to these procedures (and they were adopted during the course of briefing the instant motions), other than to assert that there may be some NSLs that were issued prior to 2015 that will not be subject to the new procedures based on when the underlying investigations began and ended. However, the government stated that the investigations related to the NSLs in these cases are all open, and thus the procedures will apply to these NSLs if and when those investigations close. Further, the Court finds that these procedures

---

[16] The FBI has also re-reviewed the need for the nondisclosure requirements for these particulars NSLs in connection with the current briefing, and has submitted the classified declarations in support of the government's position that the nondisclosure requirements remain necessary.

provide a further mechanism for review of nondisclosure requirements.

Finally, the Court finds that section 604 of the USAFA, which permits recipients of NSLs to make semi-annual public disclosures of aggregated data in "bands" about the number of NSLs they have received, supports a conclusion that the NSL statutes are narrowly tailored because this section permits recipients to engage in some speech about NSLs, even when the nondisclosure requirements are still in place.

V. 18 USC § 3551(b) Review of Pending Nondisclosure Requests

In addition to the parties' combined challenge to the constitutionality of the statutes and regulations now governing NSL requests, this Court is presented with consideration of the appropriateness of continued nondisclosure of the four specific NSL applications which gave rise to these cases. The Court has reviewed, *in camera* and subject to complex security restrictions, the certifications drafted pursuant to amended 18 U.S.C. § 3511(b)(2), supporting the government's request for continued nondisclosure of the existence of the NSLs. The regulations and the case law then require that this Court determine whether there is a reasonable likelihood that disclosure of the information subject to the nondisclosure requirement would result in a danger to the national security of the United States, interference with a criminal, counterterrorism or counterintelligence investigation, interference with diplomatic relations or danger to a person's life or physical safety.

As to three of the certifications (in cases c:13-cv-1165 SI and 3:11-cv-2173 SI), the Court finds that the declarant has made such a showing. As to the fourth (in case 3:13-mc-80089 SI), the Court finds that the declarant has not. Nothing in the certification suggests that there is a reasonable likelihood that disclosure of the information subject to the nondisclosure requirement would result in a danger to the national security of the United States, interference with a criminal, counterterrorism or counterintelligence investigation, interference with diplomatic relations or danger to a person's life or physical safety.

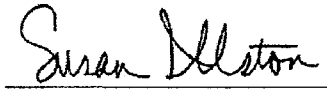
CONCLUSION

For the foregoing reasons and for good cause shown, in cases c:13-cv-1165 SI and 3:11-cv-2173 SI the Court hereby DENIES petitioners' motions and GRANTS the government's motions. In case 3:13-mc-80089 SI, the Court hereby GRANTS in part and DENIES in part petitioner's motion and GRANTS in part and DENIES in part the government's motion. The Government is therefore enjoined from enforcing the nondisclosure provision in case 3:13-mc-80089 SI. However, given the significant constitutional and national security issues at stake, enforcement of the Court's order will be stayed pending appeal, or if no appeal is filed, for 90 days.

The Court sets a status conference for April 15, 2016 at 3:00 p.m. to address what matters, if any, remain to be decided in these cases prior to the entry of judgment, as well as whether any portions of this order can be unsealed.

IT IS SO ORDERED.

Dated: March 29, 2016



SUSAN ILLSTON
United States District Judge

Exhibit C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In Re NATIONAL SECURITY LETTERS

[redacted]

Civil Action No. 16-518 (JEB)

MEMORANDUM OPINION AND ORDER

In [redacted] the Federal Bureau of Investigation issued two separate National Security Letters to Respondent [redacted] seeking limited information about two customer accounts in connection with a national-security investigation. Pursuant to the terms of those two NSLs, [redacted] was prohibited from disclosing their existence or contents to the two targets. Invoking its statutory right to judicial review of this prohibition, Respondent has now asked this Court to take an independent look at its continuing nondisclosure obligation. Agreeing that indefinite nondisclosure is not appropriate here, the Court will order the FBI to conduct triennial reviews going forward.

I. Background

The FBI may issue an NSL, a form of administrative subpoena, to a wire- or electronic-communications service provider seeking non-content information, as long as the Bureau certifies that the records sought are "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(b)(1). In addition, if the FBI certifies that "the absence of a prohibition of disclosure . . . may result in – (i) a danger to the national security of the United States; (ii) interference with a criminal, counterterrorism, or counterintelligence investigation; (iii) interference with diplomatic relations; or (iv) danger to the life or physical safety of any person," the service provider is prohibited from

disclosing the existence of the NSL. Id. § 2709(c)(1)(B). To avoid potential First Amendment concerns with such a restraint on speech, however, Congress last year, as part of the USA FREEDOM Act of 2015 (USAFA), provided: "If a recipient of [such an NSL] wishes to have a court review a nondisclosure requirement imposed in connection with the request or order, the recipient may notify the Government or file a petition for judicial review . . . ." 18 U.S.C. § 3511(b)(1)(A).

In this case, the Bureau issued two NSLs to [redacted] in [redacted] seeking records relating to two subscribers. See Pet., Exhs. 2-3. These NSLs carried the requisite certification that nondisclosure was necessary to avoid the harms listed in the statute. See id. Although the judicial-review provision at that time differed from its current state, suffice it to say that [redacted] did not seek any court intervention for the ensuing [redacted]-plus years.

[redacted] however, changed its mind in 2016. In February of this year, it officially notified the government that it desired to exercise its rights under § 3511(b). See Pet., Exh. 4. More specifically, it sent a letter expressing its "wish[] to have a court individually review the nondisclosure requirements imposed in connection with" the NSLs. Id. Punctually observing its obligations under the statute, the government then filed this action asking this Court for such review. See ECF No. 1 (Petition). It simultaneously filed *in camera* the classified Declaration of Michael B. Steinbach, Executive Assistant Director of the FBI's National Security Branch, which explained the specific nature of the two NSLs and why the statutory harms articulated in § 2709 still applied. It thus maintained that the nondisclosure provisions should remain in force. See id., Exh. 1 at 2.

[redacted] responded that it did not doubt the legitimacy of such harms, nor did it seek to challenge the constitutionality of § 2709. See Resp. at 2. It argued only that the Court should

require some periodic review of the necessity of nondisclosure, as opposed to allowing it to operate indefinitely. Respondent took this position even though the government pointed out that the language of § 3511(b) appears to permit an NSL recipient to seek multiple reviews of the nondisclosure requirements by filing successive petitions. After a status hearing was unsuccessful in crafting a compromise solution, the Court directed the parties to submit further pleadings regarding the propriety of an order in this case that directed the FBI to conduct periodic reviews. See ECF No. 12 (Order). Now that the parties have complied, the matter is ripe for decision.

II. Analysis

Once a district court receives a petition for nondisclosure review, it "should rule expeditiously, and shall, subject to [the statutory bases for nondisclosure], issue a nondisclosure order that includes conditions appropriate to the circumstances." 18 U.S.C. § 3511(b)(1)(C) (emphasis added); see also In re National Security Letters, No. 11-2173 at 30 (N.D. Cal. Mar. 29, 2016) (Order re: Renewed Petitions), attached as Exh. 1 to Gov't Notice of Supp. Auth. (ECF No. 7) (Section 3511(b)(1)(C) now amended to "provide[] that upon review, a district court 'may issue a nondisclosure order that includes conditions appropriate to the circumstances'"); [redacted] Opp. (ECF No. 18), Exh. E (Hearing Transcript) at 8 (government agreeing that Court may issue an order "appropriate under the circumstances"). The question this case poses, therefore, is what conditions, if any, are appropriate here. The government takes the position that an unconditional order maintaining nondisclosure should issue – subject to the Attorney General's recently issued procedures set forth below – while [redacted] seeks a requirement that the FBI periodically review the necessity of nondisclosure.

To determine the answer, the Court starts with the USAFA, which last year ordered the Attorney General, within 180 days of the statute's enactment, to "adopt procedures with respect to nondisclosure requirements" – under, *inter alia*, § 2709 – to mandate:

> (A) the review at appropriate intervals of such a nondisclosure requirement to assess whether the facts supporting nondisclosure continue to exist;
> (B) the termination of such a nondisclosure requirement if the facts no longer support nondisclosure; and
> (C) appropriate notice to the recipient of the national security letter, or officer, employee, or agent thereof, subject to the nondisclosure requirement, and the applicable court as appropriate, that the nondisclosure requirement has been terminated.

USA FREEDOM Act of 2015, Pub L. No. 11A-213, § 502(f)(1), 129 Stat. 268, 288 (emphasis added). The Attorney General complied, and in November 2015 the FBI published its Termination Procedures, which provide for Bureau review of any NSL nondisclosure prohibition at two distinct intervals: (1) at the close of any investigation in which an NSL containing a nondisclosure provision was issued; and (2) on the three-year anniversary of the initiation of the investigation for which an NSL was issued, unless previously closed. If such review determines that the statutory standards for nondisclosure are still met, then the gag order remains in place. See FBI Termination Procedures for National Security Letter Nondisclosure Requirement (Nov. 24, 2015), https://www.fbi.gov/file-repository/nsl-ndp-procedures.pdf/view.

Such procedures, as [redacted] points out, leave several large loopholes. First, there is no further review beyond these two, meaning that where a nondisclosure provision is justified at the close of an investigation, it could remain in place indefinitely thereafter. See Resp. at 7. Second, these procedures by their own terms apply only to "investigations that close and/or reach their three-year anniversary date on or after the effective date of these procedures," FBI Term. Proc. at 3; as a result, "a large swath of NSL nondisclosure provisions [that predate the procedures] may never be reviewed and could remain unlimited in duration." Resp. at 7. Third, for long-running

investigations, there could be an extended period of time – indefinite for unsolved cases – between the third-year anniversary and the close date. Id.

These loopholes thus give the Court some pause as to whether the Termination Procedures clearly comply with the USAFA's mandate that requires "review at appropriate intervals." USAFA § 502(f)(1); see also H.R. Rep. No. 114-109, at 26 (2015) (Section 502 "also provides that the Attorney General shall adopt procedures for the review of nondisclosure requirements issued pursuant to an NSL. These procedures require the government to review at appropriate intervals whether the facts supporting nondisclosure continue to exist . . . .") (emphasis added).

In addition, in a case decided after the passage of the USAFA but before the Attorney General had implemented her Termination Procedures, Judge James Bredar of the District of Maryland concluded that the NSL in question, whose nondisclosure requirement had been implemented for an indefinite duration, was "problematic." Lynch v. Under Seal, No. 15-1180 at 4 (D. Md. Sept. 17, 2015). He thus held that, until the Attorney General implemented the new procedures, the government was required to review every 180 days the rationale for the nondisclosure requirement's continuation. Id.; see also In re National Security Letters, No. 11-2173 at 30 ("At the hearing, the government stated that 'conditions appropriate to the circumstances' could include a temporal limitation on nondisclosure . . . .").

It was against this backdrop that this Court ordered the government to explain why an annual review of the nondisclosure requirement in this case would not be appropriate. In response, the government submitted both a classified and an unclassified declaration from Michael Steinbach. The former, reviewed by the Court *in camera*, reasonably explains why the nondisclosure requirements in the two NSLs at issue are unlikely to be lifted by the FBI any time

soon. The latter offers more detail on the financial and logistical burdens the FBI would face if it had to adopt an annual review in all of its NSL cases. [redacted] responded that the only question relates to the burdens in this case, not generally.

The Court finds neither of these diametrically opposing views persuasive. On the one hand, it would be disingenuous for the Court to craft an order expecting that no other provider (or, for that matter, [redacted] itself) would seek similar conditions attached to the nondisclosure requirements in other cases. On the other, the Court would be precipitate in leaping to the conclusion that an order in this case would necessarily require a revamping of the FBI's procedure in relation to all 16,000 NSLs that are issued annually.

Where lies the middle ground? The Court believes that, given both the facts and circumstances of this particular case and the legal authority discussed above, a triennial review fairly balances the specific burdens on the FBI against the countervailing interest that [redacted] has in avoiding a lengthy and indefinite nondisclosure bar. An annual review in a case in which reasonably lengthy nondisclosure is likely would be unduly cumbersome, but an indefinite bar (absent further petitions by [redacted] seems inconsistent with the intent of the law. A review conducted every three years, furthermore, mirrors that timeframe set out in the Termination Procedures.

III. Conclusion

The Court, accordingly, finds, under 18 U.S.C. § 3511(b)(1)(C) and (b)(3), that there is good reason to believe that disclosure of the [redacted] and [redacted] NSLs served on [redacted] may result in a danger to the national security of the United States; interference with a criminal, counterterrorism, or counterintelligence investigation; interference with diplomatic relations; or danger to the life or physical safety of any person.

It therefore ORDERS that:

1. [redacted] remains bound by the nondisclosure provisions of 18 U.S.C. § 2709, including the requirement that it not disclose the fact or contents of the NSL to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request); and

2. The FBI shall, every three years from this date, review the need for such nondisclosure and inform [redacted] of its decision. Such obligation shall terminate upon the notification to [redacted] that nondisclosure is no longer prohibited.

IT IS SO ORDERED.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: July 25, 2016

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE NATIONAL SECURITY LETTER	*	
LORETTA E. LYNCH, *United States Attorney General*, **Petitioner**	*	
v.	*	**CIVIL NO. JKB-15-1180**
UNDER SEAL, **Respondent**	*	

* * * * * * * * * * * *

MEMORANDUM

Pending before the Court is United States Attorney General Loretta E. Lynch's petition for judicial review and enforcement of a National Security Letter ("NSL") pursuant to 18 U.S.C. § 3511(c). (Pet., ECF No. 1.) The matter has been thoroughly briefed by the parties (ECF Nos. 6, 11, 12, 15, 16, 19, 20), and no hearing is required, Local Rule 105.6 (D. Md. 2014). The petition, as modified herein, will be granted.

(G) the Federal Bureau of Investigation ("FBI") issued an NSL to Respondent Under Seal ("Respondent"). Respondent has not contested that it is a "wire or electronic communication service provider" ("ECSP") within the meaning of 18 U.S.C. § 2709(a), which authorizes the FBI to issue an NSL requiring an ECSP to provide "subscriber information and toll billing records, or electronic communication transactional records in its custody" to the FBI. Respondent concedes it supplied the requested information after it received the NSL and did not contest it. (Resp.'s Opp'n 10.) Further, Respondent abided by the nondisclosure requirement contained in the NSL. (*Id.* 11.) (G) Respondent notified the FBI that it intended to file a petition to set aside the nondisclosure

provision of the NSL. (Pet., Ex. 1.) Respondent opined that the nondisclosure provision may no longer be needed. Respondent also invited the Government to initiate a judicial review proceeding in lieu of Respondent's filing a petition. (*Id.*) The Government responded by initiating the instant proceeding.

Just prior to Respondent's filing of its opposition to the petition, the laws governing NSLs were amended via the USA FREEDOM Act of 2015, Pub. L. 114-23, 129 Stat. 268.[1] Accordingly, the Court will conduct its judicial review under the most recent version of the relevant statutes, specifically, sections 2709 and 3511 of Title 18, United States Code.

Respondent argues the Government has not met its burden of establishing a justification for a continued nondisclosure requirement. Understandably, Respondent makes this argument in the dark since it is not privy to the classified materials supplied to the Court on an *ex parte* basis, as permitted under § 3511(e). However, after reviewing those materials, the Court makes the following findings:

1. The information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities. 18 U.S.C. § 2709(b)(1).
2. There is reason to believe that disclosure of the information subject to the nondisclosure requirement during the applicable time period may result in a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person. 18 U.S.C. § 3511(b)(3).
3. The materials in this case must be kept under seal to prevent the unauthorized disclosure of the Government's investigative activities. 18 U.S.C. § 3511(d).

[1] "USA FREEDOM" is an acronym for Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring.

As to the last point, the Court awaits the Government's promised redacted versions of the filings in this case and its promised motion to partially unseal the redacted filings. (Pet.'s Reply 2 n.2.)

The Court further concludes Respondent is not entitled to access to the classified materials that form the basis for the Court's determination. Respondent has presented no authority for that proposition. The statute governing judicial review clearly sets up a mechanism for *ex parte* judicial review of the classified materials. It follows, then, that Congress did not envision allowing recipients of NSLs also to review those materials.

Respondent has argued the NSL's nondisclosure requirement infringes upon its constitutional right of free speech. (Resp.'s Opp'n 1.) Assuming without deciding that the statutes as revised implicate First Amendment concerns of free speech, the Court holds the statutory authorization for an NSL to include a nondisclosure requirement and the particular nondisclosure requirement at issue here pass strict scrutiny. The first part of this inquiry is "whether the practice in question furthers an important or substantial governmental interest unrelated to the suppression of expression." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (internal alteration and quotation marks omitted). As the Supreme Court has said, "It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). The other part of the constitutional inquiry is "whether the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved." *Seattle Times*, 467 U.S. at 32 (internal alteration and quotation marks omitted). The statute's allowance of a nondisclosure requirement and the scope of the requirement in the NSL in the instant case are

necessary, in the Court's judgment, to the protection of national security. The NSL's infinite duration for the nondisclosure requirement is problematic, however.

At present, the nondisclosure requirement in this case has no ending date, and the Court's review of its continued viability falls within an interim period between the effective date of the USA FREEDOM Act of 2015, which directs the Attorney General to "adopt procedures with respect to nondisclosure requirements . . . to require . . . review at appropriate intervals . . . and termination . . . if the facts no longer support nondisclosure," Pub. L. 114-23, title V, § 502(f)(1) (*see* Note foll. 12 U.S.C. § 3414), and the anticipated but unknown date when the Attorney General will have actually promulgated such procedures. In the absence of those governing procedures, the Court will require the Government to review every 180 days the rationale for the nondisclosure requirement's continuation. Once the Attorney General's procedures are in place, then the nondisclosure requirement will be subject to review thereunder, and this Court's mandate of review every 180 days will no longer be in force.

One other observation is that the USA FREEDOM Act of 2015 included a new United States Code section, 50 U.S.C. § 1874, that permits public reporting of the receipt of national security process by persons subject to such orders, including NSLs. Prior to this new law's enactment, Deputy Attorney General James M. Cole in January 2014 issued a letter to several ECSPs and clarified what reports about national security process by ECSPs to the public would be acceptable to the Government. Letter, James M. Cole to Colin Stretch *et al.*, Jan. 27, 2014, http://www.justice.gov/iso/opa/resources/366201412716018407143.pdf (accessed Sept. 16, 2015).

(G)

(G)

The methods of reporting established in § 1874—with reporting allowed in "bands" of numbers and with restriction on the period of time for which a report may be issued—are a reasonable accommodation of an ECSP's desire for transparency and the Government's compelling interest in national security.

In conclusion, the Government has justified its petition for enforcement of the nondisclosure provision in the NSL directed to Respondent. A separate order will issue granting enforcement, as modified herein.

DATED this 17th day of September, 2015.

BY THE COURT:

/s/
James K. Bredar
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE NATIONAL SECURITY LETTER	*	
LORETTA E. LYNCH, *United States Attorney General*, **Petitioner**	*	
v.	*	**CIVIL NO. JKB-15-1180**
UNDER SEAL, **Respondent**	*	

* * * * * * * * * * * *

ORDER

In accordance with the foregoing memorandum, IT IS HEREBY ORDERED:

1. The Government's Petition for Judicial Review and Enforcement of a National Security Letter Pursuant to 18 U.S.C. § 3511(c) (ECF No. 1) IS GRANTED.
2. The nondisclosure requirement in the National Security Letter ("NSL") issued to Respondent IS MODIFIED so that the Government must review the necessity for nondisclosure every 180 days following the date of this order.
3. The Government's duty to conduct the review mandated in Item 2 SHALL EXPIRE upon the Attorney General's promulgation of review procedures pursuant to Pub. L. 114-23, title V, § 502(f)(1) (*see* Note foll. 12 U.S.C. § 3414). Thereafter, the Attorney General SHALL REVIEW the nondisclosure requirement at issue in the instant matter in accordance with the Attorney General's duly promulgated review procedures.
4. Respondent SHALL COMPLY with the nondisclosure requirement of the NSL and SHALL NOT DISCLOSE the fact of receipt of the NSL, the contents of the NSL, or any attachment to the NSL to anyone other than those persons to whom disclosure is

necessary in order to comply with the request, an attorney in order to obtain legal advice or assistance regarding the request, or other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director; further, disclosure may only be made to the above-listed individuals pursuant to the conditions specified in 18 U.S.C. § 2709(c)(2).

5. Any failure to obey this order may be punished by the Court as contempt thereof. 18 U.S.C. § 3511(c).
6. The Clerk SHALL ENSURE all counsel of record receive a copy of this order and the accompanying memorandum.
7. The Clerk SHALL CLOSE this case.

DATED this 17th day of September, 2015.

BY THE COURT:

/s/
James K. Bredar
United States District Judge

Exhibit E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

IN RE: GRAND JURY SUBPOENA
SUBPOENA TO FACEBOOK

----------X

----------X

IN RE: SUBPOENA

----------X

MEMORANDUM AND ORDER

16-MC-1300 (JO) 16-MC-1301 (JO)

16-MC-1302 (JO) 16-MC-1303 (JO)
16-MC-1304 (JO) 16-MC-1305 (JO)
16-MC-1306 (JO) 16-MC-1307 (JO)
16-MC-1308 (JO) 16-MC-1309 (JO)
16-MC-1310 (JO) 16-MC-1311 (JO)
16-MC-1312 (JO) 16-MC-1313 (JO)
16-MC-1314 (JO)

James Orenstein, Magistrate Judge:

In my role as the Duty Magistrate Judge for May 10, 2016, *see* Rules for the Division of Business Among District Judges for the Eastern District of New York 50.5(b), I have received fifteen separate applications, each with one of the two captions set forth above, each submitted in hard copy by hand but not yet filed on the court's docket, and each seeking an order pursuant to 18 U.S.C. § 2705(b) commanding the recipient of a subpoena not to disclose the subpoena's existence to any person. In each case, the application relies on a boilerplate recitation of need that includes no particularized information about the underlying criminal investigation. For the reasons set forth below, I now deny each application without prejudice to renewal upon a more particularized showing of need sufficient to support a finding that disclosure of the existence of a given subpoena will result in any of the harms that the pertinent statute lists as a basis for such a restraint.

I. Background

A. Authority to Issue Non-Disclosure Orders

The Stored Communications Act, 18 U.S.C. § 2701, *et seq.* (the "SCA"), authorizes a court, under certain defined conditions, to prohibit providers of electronic communications and remote computing services (collectively, "service providers") from notifying others of the existence of various types of government-issued orders compelling the disclosure of records. Specifically:

> The court shall enter such an order *if it determines* that there is reason to believe that notification of the existence of the warrant, subpoena, or court order *will* result in—
>
> (1) endangering the life or physical safety of an individual;
>
> (2) flight from prosecution;
>
> (3) destruction of or tampering with evidence;
>
> (4) intimidation of potential witnesses; or
>
> (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

18 U.S.C. § 2705(b) (emphasis added).

B. The Government's Applications

1. *In re: Subpoena*

In each of the *In re: Subpoena* ("*Subpoena*") actions, the government has filed under seal a motion styled as follows: "APPLICATION FOR ORDER COMMANDING [SERVICE PROVIDER] NOT TO NOTIFY ANY PERSON OF THE EXISTENCE OF SUBPOENA[.]" The text of each application is identical, save for the identification of the service provider that is the subject of the proposed order. I reproduce below the application's full text.[1]

> The United States requests that the Court order [service provider] not to notify any person (including the subscribers and customers of the accounts(s) listed in the subpoena) of the existence of the attached subpoena until further order of the Court.
>
> [Service provider] is a provider of an electronic communication service, as defined in 18 U.S.C. § 2510(15), and/or a remote computer service, as defined in 18 U.S.C. § 2711(2). Pursuant to 18 U.S.C. § 2703, the United States obtained the attached subpoena, which requires [service provider] to disclose certain records and information to the United States. This Court has authority under 18 U.S.C. § 2705(b) to issue "an order commanding a provider of electronic communications service or remote computing service to whom a warrant, subpoena, or court order is directed, for such period as the court deems appropriate, not to notify any other person of the existence of the warrant, subpoena, or court order." *Id.*

[1] The application in each case includes a copy of the pertinent grand jury subpoena as an attachment; it should therefore remain under seal. There is nothing in the quoted text of the application, however, that will reveal anything about the government's investigation.

In this case, such an order would be appropriate because the attached subpoena relates to an ongoing criminal investigation that is neither public nor known to all of the targets of the investigation, and its disclosure *may* alert the targets to the ongoing investigation. Accordingly, there is reason to believe that notification of the existence of the attached subpoena *will* seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, and/or change patterns of behavior. *See* 18 U.S.C. § 2705(b). Some of the evidence in this investigation is stored electronically. If alerted to the existence of the subpoena, the subjects under investigation *could* destroy that evidence.

WHEREFORE, the United States respectfully requests that the Court grant the attached Order directing [service provider] not to disclose the existence or content of the attached subpoena, except that [service provider] may disclose the attached subpoena to an attorney for [service provider] for the purpose of receiving legal advice.

The United States further requests that the Court order that this application and any resulting order be sealed until further order of the Court. As explained above, these documents discuss an ongoing criminal investigation that is neither public nor known to all of the targets of the investigation. Accordingly, there is good cause to seal these documents because their premature disclosure may seriously jeopardize that investigation.

Subpoena, Application at 1-2 (emphasis added).

On the basis of that application, the government in each case asks me to enter the following order:

The United States has submitted an application pursuant to 18 U.S.C. § 2705(b), requesting that the Court issue an Order commanding [service provider], an electronic communication service provider and/or a remote computing service, not to notify any person (including the subscribers and customers of the account(s) listed in the subpoena) of the existence of the attached subpoena until further order of the Court.

The Court determines that there is reason to believe that notification of the existence of the attached subpoena *will* seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, and/or change patterns of behavior. See 18 U.S.C. § 2705(b).

IT IS THEREFORE ORDERED under 18 U.S.C. § 2705(b) that [service provider] shall not disclose the existence of the attached subpoena, or this Order of the Court, to the listed subscriber or to any other person, unless and until otherwise authorized to do so by the Court, except that [service provider] may disclose the attached subpoena to an attorney for [service provider] for the purpose of receiving legal advice.

IT IS FURTHER ORDERED that the application and this Order are sealed until otherwise ordered by the Court.

Subpoena, Proposed Order at 1-2 (emphasis added).

2. *In re: Grand Jury Subpoena to Facebook*

Each of the two applications captioned *In re: Grand Jury Subpoena to Facebook* ("*Facebook*") is similar to its counterparts in the *Subpoena* cases, with one exception discussed below. Each relies on the same assertions about potential investigative harms to seek an order prohibiting Facebook from disclosing the existence of the pertinent subpoena to any person, and each seeks a non-disclosure order including, in essentially the same language, the same findings and directives quoted above.[2]

In addition to seeking a non-disclosure order, the *Facebook* applications also include a request for an order prohibiting Facebook from taking certain other actions – which the government asserts Facebook has previously taken in comparable circumstances – that do not inherently reveal the existence of the subpoena but that, in the government's view, "provid[e] government targets effective notice that they are the subject of government investigation." *Facebook*, Application at 2.[3] Based on that assertion about "effective notice," the government asserts that the additional relief it seeks is authorized under the non-disclosure provision of 18 U.S.C. § 2705(b). Accordingly, the proposed order in each *Facebook* action also includes the following language:

> *The Court determines* that there is reason to believe that notification of the existence of the Subpoena or [the additional actions at issue] *would* provide targets of the

[2] The only textual difference between the two categories of applications and proposed orders that is even remotely substantive, aside from those differences that accommodate the government's additional request in *Facebook*, is that the *Facebook* applications cite subsections (2), (3), and (5) of 18 U.S.C. § 2705(b), whereas the *In re: Subpoena* applications provide no such specificity. In each case, however, the government raises concerns about the same potential harms to its investigations.

[3] As discussed below, the government has not yet provided any basis to conclude either that Facebook will take the actions at issue if not prohibited from doing so or that such actions would in any way compromise any criminal investigation. Nevertheless, because I have not previously asked the government to substantiate its assertions in this regard, I avoid a specific description of the conduct the government seeks to regulate in order to allow a public discussion of the reasons for this order.

> investigation with effective notice of *the government's investigation* and would seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, change patterns of behavior, or notify confederates. See 18 U.S.C. § 2705(b)(2), (3), (5).

Facebook, Proposed Order at 1 (emphasis added).

II. Discussion

A. Prejudice to Investigations

1. Prejudice Arising From Actual Notification of a Subpoena's Existence

As noted above, the sole fact that the government posits in each case in support of a non-disclosure order is that the pertinent subpoena "relates to an ongoing criminal investigation that is neither public nor known to all of the targets of the investigation[.]" Application at 1. From this premise, the government concludes that the subpoena's "disclosure *may* alert the targets to the ongoing investigation." *Id.* (emphasis added).[4] Having thus sought to demonstrate the possibility of tipping off a target to the existence of an investigation, the government then reasons that disclosure of the subpoena therefore "*will* seriously jeopardize the investigation, including by giving targets an opportunity to flee or continue flight from prosecution, destroy or tamper with evidence, and/or change patterns of behavior." *Id.* at 1-2 (emphasis added). Moreover, the government notes that "[s]ome of the evidence in this investigation is stored electronically." *Id.* at 2. As a result, the government concludes, "[i]f alerted to the existence of the subpoena, the subjects under investigation

[4] I assume for purposes of discussion that in each case there are in fact specific "targets" of the pertinent investigations – that is, persons "as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." U.S. Attorney's Manual § 9-11.151. It would, however, be somewhat surprising if that were true: in a great many cases – including some in which the government might have a very good reason to fear that disclosing a subpoena's existence might prejudice the government's investigation – a grand jury can subpoena and receive a great deal of information long before the government concludes that anyone qualifies as a "target" rather than a "subject" of the investigation (that is, a person whose conduct is merely "within the scope of the grand jury's investigation[,]" *id.*). The difference between a target and a subject, however, is one of some significance to consideration of the likely effect of the disclosure of a subpoena.

could destroy that evidence." *Id.* (emphasis added).[5] I respectfully disagree with the government's reasoning.

First, while it is unquestionably true that a service provider's disclosure of a subpoena for customer records "may" alert the target of an investigation to its existence, it is just as true that disclosure may not have that effect. To cite just one example, sometimes subpoenas for service providers' records seek information from the account of a target's victim (who might well fall within the definition of an investigative "subject"), or from some other person whose interests are not aligned with the target's but who may nevertheless have information relevant to the investigation. In such circumstances, there is simply no reason to presume that disclosure of the subpoena to the customer whose records the government seeks will harm the investigation in any way at all. Thus, before I can conclude that disclosure "will" result in such harm as the statute requires, I must have information about the relationship, if any, between the customer whose records are sought and any target of the investigation.[6] The sole fact asserted by the government to date – the targets' ignorance of the existence of an ongoing criminal investigation – does not support an inference that a service provider's disclosure of a subpoena to the pertinent customer will have any effect on the investigation.

---

[5] It is not clear that the government intends to posit a connection between the fact that some evidence is stored electronically and the likelihood of any of the harms listed in Section 2705(b). If that is the government's intent, it has not explained why it is any more likely for an investigative target to engage in obstructive conduct when some evidence is stored electronically than when the evidence takes other forms. If anything, the reality that electronically stored evidence is often accessible in multiple repositories (and thus harder to effectively erase) and that attempts to delete or alter such evidence (even if successful) often leave identifiable traces – facts which appear to be gaining wider dissemination in an increasingly technologically proficient society – suggests at least a possibility that tipping off a target to the existence of an investigation will pose less risk to electronically stored evidence than to physical documents or the availability of oral testimony.

[6] The government provides no reason to anticipate that the service provider in each case would notify anyone other than the customer whose records are sought. If there is reason to believe the service provider would alert persons other than the pertinent customer if not prohibited from doing so, the government can of course make such a showing.

Second, there is no reason to assume that tipping off an investigative target to the investigation's existence necessarily "will" result in one of the harms contemplated by the SCA. To be sure, such information can easily have such an effect. But if Congress presumed that providing such information to an investigative target would inevitably lead to such consequences, the judicial finding the SCA requires would be meaningless. There will plainly on occasion be circumstances in which an investigative target either lacks the ability or the incentive to flee, to tamper with evidence, or otherwise to obstruct an investigation. To cite just two possibilities: the target may be incarcerated and lack effective access to evidence and witnesses; alternatively, the target may be a public figure with a strong incentive to affect a public posture of innocence and cooperation with law enforcement. In most cases, it seems likely that the government can easily make a showing that there is reason to believe that a target's knowledge of an investigation will indeed lead to obstructive behavior – but not in every case.

In short, the government contends that notification necessarily will lead to obstruction. But the SCA precludes such reasoning; to the contrary, it allows a court to issue a non-disclosure order only "if it determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result[.]" 18 U.S.C. § 2705(b). That language inherently assumes that sometimes notifying the target of the existence of an investigation will result in certain types of misconduct but that other times it will not, and that it is up to a judge to make the necessary determination in a given case based on the available evidence. As a result, in the absence of any case specific information aside from the assertion that the target of an investigation does not know of its existence, it is impossible to make the factual determination necessary for a non-disclosure order.

Finally, the government's assertion that "[i]f alerted to the existence of the subpoena, the subjects under investigation *could* destroy that evidence[,]" Application at 2 (emphasis added), is

manifestly insufficient. The SCA requires a determination that disclosure "will" have certain adverse effects, not that it "could" do so.

Government prosecutors and agents have a difficult job investigating crime, and one that is made more difficult by the fact that some of the investigative techniques they must rely on can backfire by alerting criminals to the fact of the investigation.[7] The SCA provides some measure of relief against that risk, but it does not do so indiscriminately. The government cannot, consistent with the statute, obtain an order that constrains the freedom of service providers to disclose information to their customers without making a particularized showing of need. The boilerplate assertions set forth in the government's applications do not make such a showing, and I therefore deny all of the pending requests for non-disclosure orders. The ruling is without prejudice to the government's right to renew its requests on the strength of additional facts about each investigation that permit a finding that disclosure of a subpoena will result in an identifiable form of harm to the investigation.[8]

---

[7] To guard against that risk, the government routinely asks subpoena recipients who are not investigative targets to voluntarily refrain from disclosure – and also, on occasion, improperly turns that request into what appears to be a judicial command on the face of the subpoena itself. *See United States v. Gigliotti*, 15-CR-0204 (RJD), docket entry 114 (Memorandum and Order), slip op. at 2-3, 7-8 (E.D.N.Y. Dec. 23, 2015). It is entirely understandable that the government is as proactive as the law allows it to be in maintaining the secrecy of its investigations, and just as understandable that it will seek to test those legal limits. Applications for the kind of non-disclosure orders at issue here have been routinely granted for a long time, and I do not fault the government for continuing to engage in a practice that I and other judges have unquestioningly endorsed. But having belatedly reconsidered the issue, I now conclude that my prior orders granting similar boilerplate applications were erroneous.

[8] I do not consider or address here the extent to which the relief the government seeks is in tension with either the First Amendment rights of service providers to provide information to their customers or the Fourth Amendment rights of those customers to be provided notice of the government's search or seizure of their records. First, as explained above, the government has not yet established the facts necessary to support a non-disclosure order under the SCA, and so any such discussion would be premature. Second, such issues can more efficiently be resolved through adversarial testing. It is clear that a service provider subjected to a non-disclosure order under the SCA has the ability to raise such arguments in an adversarial setting after the order has issued. *See Microsoft Corp. v. U.S. Dep't of Justice*, 16-CV-0538 (JLR), docket entry 1 (Complaint) (W.D. Wash. Apr. 14, 2016) (seeking a declaration that the provision for non-disclosure orders under 18 U.S.C. § 2705(b) is unconstitutional).

2. Prejudice Arising From Facebook's Potential Additional Actions

In addition to a prohibition on explicit notification of the existence of the pertinent subpoena, each of the *Facebook* applications also seeks an order prohibiting Facebook from taking certain actions that the government asserts would indirectly, but effectively, alert targets to the existence of the government's underlying investigation. As an initial matter, this request fails for the same reasons that the request for a prohibition of explicit notification of the subpoena fails: the government has not established either that disclosure of the subpoena to a given customer will result in alerting the target to the investigation's existence or that the target of the investigation will, if notified, engage in obstructive conduct. As explained below, another reason to deny relief with respect to indirect notification is that the government has not adequately explained the connection between the actions it wants to prohibit Facebook from taking and the harm it seeks to forestall.

The government has stated no more than that Facebook has taken such actions previously in response to receiving subpoenas. *Facebook*, Application at 2. What the government has not told me is (a) whether Facebook routinely does so in response to every subpoena, or only in certain circumstances; and (b) whether, and under what circumstances, Facebook takes the same actions even in the absence of receiving a subpoena. The actions are of a sort that a service provider like Facebook might take for a wide variety of reasons having nothing to do with any criminal investigation of the customer. It therefore seems quite likely – indeed, in my view, more likely than not – that the actions at issue would not necessarily lead a Facebook customer to infer the existence of a criminal investigation, much less the existence of a subpoena.[9]

[9] In this context, the distinction between the subpoena and the underlying investigation is significant. The SCA allows a court to order a service provider "not to notify any other person of the existence of the warrant, subpoena, or court order." 18 U.S.C. § 2705(b). If Facebook took the actions at issue in response to any indication of a criminal investigation of a customer – including informal requests for assistance, or reports about the existence of an investigation, or allegations by other customers of criminal conduct – a customer might correctly infer from Facebook's actions the existence of an

Moreover, the government provides no authority for the proposition that the SCA authorizes a court to prohibit an action that merely allows a customer to infer the existence of a subpoena – as opposed to prohibiting actual notification of that fact. The statute does not explicitly provide such authority, and such a broad reading of the law might have adverse consequences for a service provider or others that Congress did not intend. For example, if Facebook takes the actions for its own business purposes upon learning of a subpoena as a prophylactic measure to prevent a customer suspected of criminal conduct from using Facebook's services to harm others, prohibiting it from doing so would impose burdens on Facebook and others that a prohibition on actual notification of a subpoena would not.[10] Accordingly, in the absence of legal authority for its broad reading of the SCA, as well as the absence of any factual basis for determining that Facebook's actions would themselves disclose the existence of the pertinent subpoenas, I deny the government's request to prohibit Facebook from taking certain actions.

B. Imposing Secrecy Requirements on the Recipients of Federal Grand Jury Subpoenas

The SCA provision generally authorizing a court to issue a non-disclosure order to a service provider receiving a subpoena does not differentiate among the different specific types of subpoena

---

investigation even if no subpoena existed that could serve as the predicate for a non-disclosure order. The SCA confers no authority to prohibit notification of the existence of an investigation – only "the existence of the warrant, subpoena, or court order." 18 U.S.C. § 2705(b). Without more information about the circumstances in which Facebook does and doesn't take the actions at issue, it is impossible to determine whether, in a given case, they would cause a customer to infer the existence of a subpoena.

[10] The government's broad reading of the SCA could also justify issuing an order requiring a service provider to make affirmatively false or misleading statements to its customers and to the public. *See generally* Wendy Everette, *"The F.B.I. Has Not Been Here (Watch Very Closely For The Removal Of This Sign)": Warrant Canaries And First Amendment Protection For Compelled Speech*, 23 Geo. Mason L. Rev. 377 (2016) (discussing the emergence of "warrant canaries" that periodically advise the public about the extent to which warrants and court orders have been served, to allow an inference of the existence of a warrant subject to a non-disclosure order if the periodic notification stops); Naomi Gilens, *The NSA Has Not Been Here: Warrant Canaries As Tools for Transparency in the Wake of the Snowden Disclosures*, 28 Harv. J.L. & Tech. 525 (2015) (same). I need not and do not consider here whether an order requiring a service provider to engage in such affirmative deception would be in tension with the First Amendment.

that a service provider might receive.[11] However, to the extent the statute provides for the issuance of an order prohibiting a service provider from disclosing the existence of a federal grand jury subpoena in particular, it is in tension with the specific rule that, as to federal grand jury proceedings, "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Fed. R. Crim. P. 6(e)(2)(A). The cited rule does not make any provision for imposing an obligation of secrecy on a witness or subpoena recipient. *See* Fed. R. Crim. P. 6(e)(2)(B); *see also* Fed. R. Crim. P. 6 advisory committee's note (1944 adoption note 2 to subdivision (e): "The rule does not impose any obligation of secrecy on witnesses.... The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate.").

I need not and do not resolve here the tension between the provision of the SCA allowing a court to impose a secrecy requirement on certain businesses receiving a wide array of state and federal compulsion orders and the rule specifically exempting federal grand jury witnesses from any secrecy requirement. My research to date reveals only two federal court opinions that address the matter: the two cases were decided in district courts outside of this circuit and reached opposite conclusions. *See In re Application of the U.S. For An Order Pursuant To 18 U.S.C. § 2705(b)*, 131 F. Supp. 3d 1266, 1276 (D. Utah 2015) (holding that the SCA permits the imposition of "secrecy obligations in addition to those stated in Rule 6(e)(2)"); *In re Application of U.S. for an Order Pursuant to 18 U.S.C. § 2705(b)*, 866 F. Supp. 2d 1172, 1173 (C.D. Cal. 2011) (holding that because of the prohibition of additional secrecy

[11] The SCA contemplates a variety of ways in which a government entity can compel a service provider to produce records, including by means of a warrant issued by a state or federal court; an administrative subpoena issued by a state or federal agency; a state or federal grand jury subpoena, or another kind of state or federal court order. *See* 18 U.S.C. § 2703(b)(1).

requirements in Fed. R. Crim. P. 6(e)(2)(A), the SCA "cannot properly be read as authorizing the Court to enjoin a provider from revealing that it has received a grand jury subpoena").[12]

The government's failure to establish the factual assertion necessary for an order under the SCA obviates the need for such a decision now. Should the government renew its applications based on individualized evidence that disclosure of a given subpoena will result in any of the harms listed in Section 2705(b), it should be prepared to demonstrate legal authority for the imposition of a secrecy requirement on a federal grand jury witness notwithstanding the specific prohibition in Rule 6.

III. Conclusion

For the reasons set forth above, I deny the application for a non-disclosure order in each of the captioned cases without prejudice to renewal upon a particularized showing of need. I respectfully direct the Clerk to create a separate public docket for each application, and within each such docket to file the pertinent application under seal to preserve the secrecy of the underlying criminal investigation, and to file this document, unsealed, on each such docket.

SO ORDERED.

Dated: Brooklyn, New York
May 12, 2016

/s/
JAMES ORENSTEIN
U.S. Magistrate Judge

[12] In a third case, *In re Application of the United States of Am. for Nondisclosure Order Pursuant to 18 U.S.C. § 2705(b) for Grand Jury Subpoena #GJ2014032122836*, 2014 WL 1775601, at *4 (D.D.C. Mar. 31, 2014), the court declined to issue a non-disclosure order without first allowing the subject of the proposed order (Twitter) to be heard. The magistrate judge's opinion did not refer explicitly to Rule 6(e)(2)(A), but did rely in part on the decision from the Central District of California cited above. *See id.* at *3. The district judge reviewing the magistrate judge's decision overruled it and issued the requested non-disclosure order. In doing so, the court noted that Rule 6(e) did not authorize seeking Twitter's input and permitted the sealing of the application and non-disclosure order; but the court did not address the applicability of Rule 6(e)(2)(A) to the viability of the government's request for a non-disclosure order under the SCA. *See Matter of Application of United States of Am. for an Order of Nondisclosure Pursuant to 18 U.S.C. §2705(B) for Grand Jury Subpoena # GJ2014031422765*, 41 F. Supp. 3d 1, 6-8 (D.D.C. 2014).